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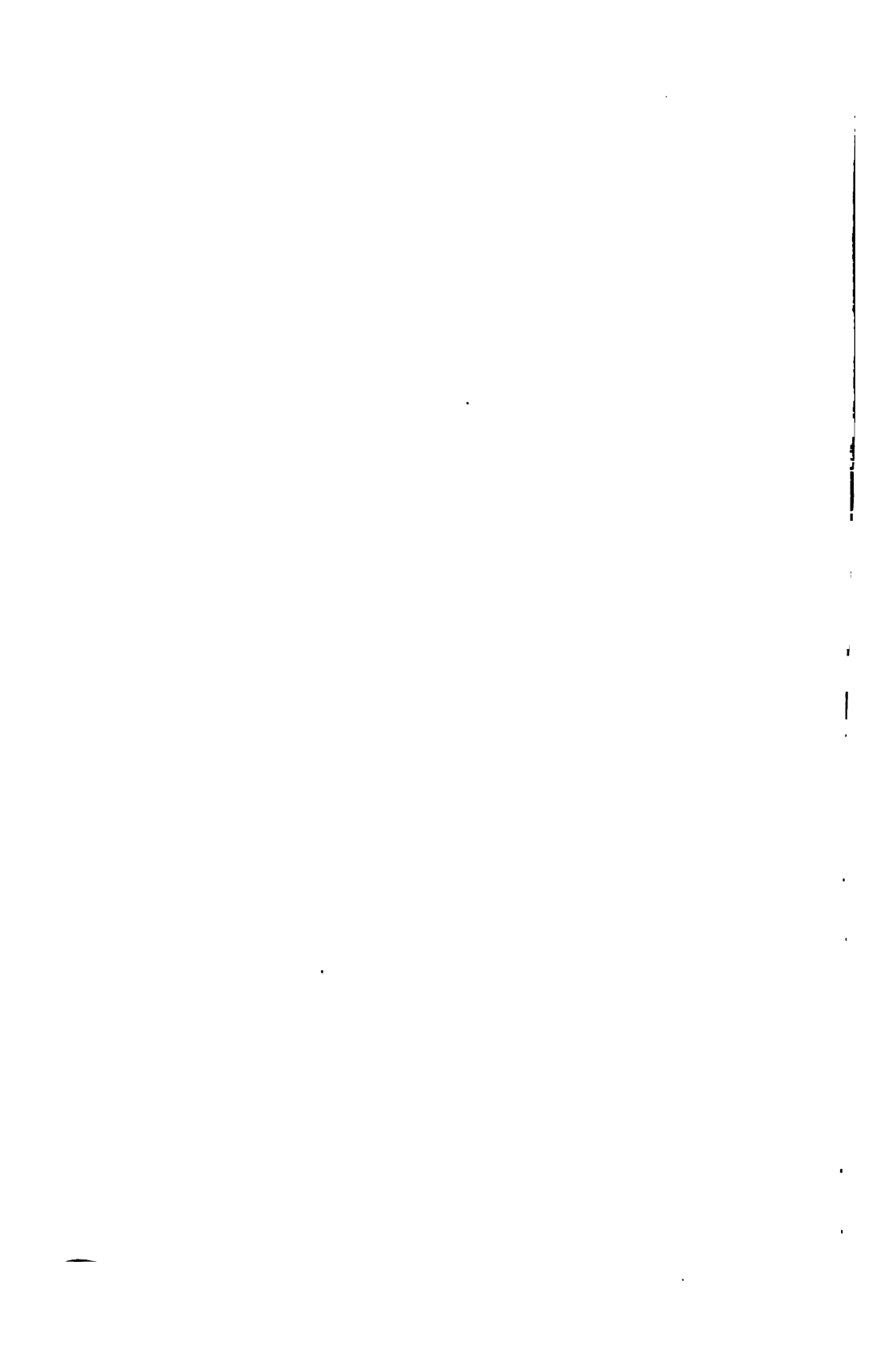
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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES CITED AND CONSTRUED, AND AN INDEX.

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CHARLES F. REMY,  
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

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VOL. 152,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1898, AND  
NOT REPORTED IN VOLUME 151, AND CASES DECIDED  
AT THE MAY TERM, 1899.

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JUDGES  
OF THE  
SUPREME COURT

OF THE  
STATE OF INDIANA,  
DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. LEANDER J. MONKS. \* †  
HON. JAMES H. JORDAN. † ‡  
HON. JAMES McCABE. §  
HON. TIMOTHY E. HOWARD. §  
HON. LEONARD J. HACKNEY. §  
HON. JOHN V. HADLEY. ‡  
HON. FRANCIS E. BAKER. ‡  
HON. ALEXANDER DOWLING. ‡

\* Chief Justice at November Term, 1898.

| Chief Justice at May Term, 1899.

† Term of office commenced January 1, 1895.

‡ Term of office expired December 31, 1898.

‡ Term of office commenced January 1, 1899.

OFFICERS  
OF THE  
SUPREME COURT.

ATTORNEY-GENERAL,  
WILLIAM L. TAYLOR.

REPORTER,  
CHARLES F. REMY.

CLERK,  
ROBERT A. BROWN.

SHERIFF,  
GEORGE W. WEIR.

LIBRARIAN,  
HOYT N. McCLAIN.



# CASES

## ARGUED AND DETERMINED

### IN THE

# Supreme Court of Judicature

### OF THE

## STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1898, AND MAY TERM,  
1899, IN THE EIGHTY-THIRD YEAR OF THE STATE.

### PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. MONTGOMERY.

[No. 17,821. Filed Feb. 19, 1898. Rehearing denied Dec. 23, 1898.]

**RAILROADS.**—*Personal Injury Caused by Negligence of Fellow Servant.*

—*Complaint.*—*Employers' Liability Act.*—Under sections 7083-7087 Burns 1894, known as the Employers' Liability Act, a complaint against a railroad company is sufficient to withstand a demurrer for want of facts where it states that the engineer, while in the service of defendant, in charge of a locomotive, negligently injured the plaintiff, both being at the time acting in the line of duty as employees of the defendant; and an averment that the engineer at the time he committed the injury was acting in the place and performing the duty of the corporation in that behalf is unnecessary. *pp. 4-7.*

**CONSTITUTIONAL LAW.**—*Title to Act.*—*Employers' Liability Act.*—

Under section 19, article 4, of the state Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, the act of March 4, 1893, entitled "An act regulating railroads and other corporations," and which enlarges the liability of railroads, is not unconstitutional. *p. 7.*

**CORPORATIONS.**—*Railroad Corporation a Person within the Meaning of Bill of Rights.*—*Constitution Construed.*—Railroad corporations

152	1
o152	357
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152	1
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152	1
157	499
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163	259
163	571

152	1
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are persons within the meaning of section 21, article 1, of the Constitution of the State, and of the equality clause of the Constitution of the United States. *p. 8.*

**CONSTITUTIONAL LAW.—Railroads.—Employers' Liability Act.**—The Employers' Liability Act (Acts 1898, p. 294), making railroad and other corporations, except municipal corporations, liable for injuries to their employes resulting from negligence of co-employes, does not deny railroad corporations the equal protection of the laws guaranteed by section 23, article 1, of the Constitution of the State, and the fourteenth amendment to the Constitution of the United States. *pp. 9-13.*

**SAME.—Corporations.—Railroads.**—Where an act fixing the liability of corporations is valid as to railroad corporations, a railroad corporation cannot be permitted to litigate the constitutionality of the act as to other corporations. *pp. 13, 14.*

**SAME.—Employers' Liability Act.—Railroads.—Release From Future Liability.**—Section 7087 Burns 1894, which nullifies contracts made by railroad companies or other corporations, releasing them from future liability to employes for personal injuries is not unconstitutional, as being in violation of section 23, article 1, of the Constitution of the State and the fourteenth amendment to the Constitution of the United States. *p. 15.*

**SAME.—Employers' Liability Act.—Title.**—The prohibition of contracts releasing corporations from their liability for personal injuries to their employes, as prescribed by section 5, of the act of March 4, 1898, is germane to and properly connected with the main subject of the act, and need not be expressed in the title. *pp. 15, 16.*

**RAILROADS.—Contract by Employe to Release Company from Liability.—Election of Remedies.—Compromise and Settlement.**—Where, under a contract between a railroad company, by the terms of which an employe agrees that the acceptance of certain benefits shall operate as a release of all claims for damages against the company, the acceptance of such benefits does not constitute an election between remedies, or a compromise and settlement, but the agreement is a release within section 5, of the Employers' Liability Act (Acts 1898, p. 294), which invalidates such contracts. *pp. 16-23.*

**JURY.—Juror Excused on Court's Own Motion.—When Not Erroneous.**—It is not error for the court on its own motion to excuse a juror, where it is not shown that the jury which was finally impaneled was not a fair and impartial jury. *pp. 23, 24.*

**SPECIAL VERDICT.—Railroads.—Rules.—Evidence.**—A special finding of the jury, that under the "rules" of the defendant railroad company certain duties were assigned to the engineer in charge of a train, may be supported by the evidence, though no particular "rule" was introduced in evidence. *p. 24.*

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**SPECIAL VERDICT.**—*Failure to Find Material Fact.*—*Remedy.*—*New Trial.*—Where a special verdict fails to find material facts, within the issues which were established by the evidence, the remedy is not by a motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved. pp. 24, 25.

**APPEAL AND ERROR.**—*Erroneous Admission of Evidence.*—*Harmless Error.*—Where evidence was erroneously admitted over the objection of defendant, but was immediately withdrawn by plaintiff and the jury was instructed not to consider the evidence, the error was rendered harmless. p. 25.

**DAMAGES.**—*Personal Injuries.*—*Physical and Mental Suffering.*—In an action for damages for personal injuries, physical and mental suffering are proper elements of damages. p. 25.

From the Cass Circuit Court. *Affirmed.*

*S. O. Pickens, N. O. Ross, G. E. Ross, D. H. Chase and G. W. Funk*, for appellant.

*S. T. McConnell, A. G. Jenkins, J. C. Nelson and Q. A. Myers*, for appellee.

**McCABE, J.**—This action was brought by the appellee against the appellant to recover damages suffered by him on account of the alleged negligence of the defendant resulting in a personal injury to the plaintiff. A demurrer to the complaint for want of sufficient facts, and a demurrer to the second paragraph of the answer, were overruled, and the issues joined were tried by a jury, resulting in a special verdict and judgment, over defendant's motion for a new trial, for \$3,000 damages.

The errors assigned call in question the rulings on demurrer, the refusal of a new trial, overruling motions for a *venire de novo*, for judgment in appellant's favor on the special verdict, and sustaining appellee's motion for judgment on the special verdict in his favor.

The only objection urged to the complaint is that it shows that the plaintiff was a freight brakeman in the defendant's service on its railroad, and that it was the negligence of the engineer of the train on which he was serving that caused his injury, and that, under the fellow servant rule,

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there was no liability. The injury occurred on July 1, 1893, after the act approved March 4, 1893, took effect, touching the liability of railroads, commonly called the "Employers' Liability Act." Acts 1893, p. 294, sections 7083-7087 Burns 1894, sections 5206s-5206v Horner 1897.

Appellant's learned counsel contend that it is settled law that the employer is not liable to an employe for injuries caused by the negligence of a co-employe in the same general service, unless the employer was guilty of some negligence in employing the servant with knowledge of his negligent habits or incompetency, or retained him after knowledge of such negligence or lack of skill. There is no showing of any such negligence on the part of the appellant, as employer, in the complaint. Appellee concedes this to be the common law rule, and that it prevailed in this State prior to the enactment above mentioned. Indeed, it is conceded by the appellee that his complaint depends upon that act for its sufficiency in its facts to constitute a cause of action, and is founded thereon.

It is first contended by the appellant that the act does not change the common law rule, and it would seem to follow, if that is true, that the complaint is clearly bad. The first section provides: "That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases." Then follow four subdivisions specifying the cases in which liability is to attach, the fourth of which, and the one on which this action is founded, reads thus: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train, upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service in any of the



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several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." Appellant's learned counsel say: "The complaint lacks two allegations to make it good under this provision. (1) That the engineer at the time was acting in the place and performing the duty of the corporation in that behalf; and, (2) that appellee was obeying or conforming to the order of some superior at the time of such injury, having authority to direct. It was not alleged that the engineer was acting in the place or performing the duty of the master, or that appellee was acting in obedience to a superior," etc.

This language, together with other parts of appellant's brief, indicates that appellant's learned counsel construe the language of the statute above quoted as conveying the meaning that the right to recover against an employer for the negligence of a co-employe or fellow servant rests upon the condition that such negligent co-employe was at the time acting in the place and performing the duty that the master or employer owed to his or its servants or employes generally, and yet they do not say so in so many words. The majority of the court are of the opinion that the decision of that question is not necessary to the decision of this case. They hold that the only part of the fourth subdivision of said section which is necessary to be considered in determining the sufficiency of the complaint is the following: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any \* \* \* locomotive engine or train upon a railway, \* \* \* and the person so injured, obeying or conforming to the order of some su-

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perior at the time of such injury, having authority to direct," and that hence it was not necessary that the complaint should state that the alleged negligent engineer, at the time he committed the alleged negligent injury, as provided in such concluding clause, was acting in the place and performing the duty of the corporation in that behalf, while the writer hereof is of the opinion that the whole of the fourth subdivision must stand together, and that the words quoted from the concluding clause qualify the liability created in the first clause or clauses. But the duty of the corporation therein mentioned, in the opinion of the writer, means, not the duty it owes to its servants, but the duty it owes to the public in carrying on its business; and the words "acting in the place of such corporation," with the other words quoted, were used to convey the idea that in order that the liability mentioned should exist, the negligent person, co-employee or fellow servant must be acting as such employee, in the line of his duty at the time of his negligence.

The writer is of opinion that the complaint is good under this construction; and the holding of the court is that, in order to make the complaint good under the first part of the subdivision quoted, as to the point in question, it is only required that it state that the engineer, while in the service of appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employees of the appellant. That being so, the averments of the complaint, showing, as they do, that at Hartford City, Indiana, the freight train upon which appellee was brakeman stopped to switch out loaded cars; that the conductor of said train, acting in the service of appellant, the authority and position of said conductor making it appellee's duty to obey his orders in respect to said train and switching, ordered appellee to go between said cars to make couplings, and while so engaged the engineer in charge of said train, also

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in appellant's service, and in the line of his duty, without signal, carelessly, negligently, and recklessly reversed said engine and applied full steam, whereupon said cars were driven and jammed together with terrific force, without notice to appellee, whereby appellee's entire right hand was caught between the bumpers and mashed off, without any fault on his part,—make the complaint sufficient, under the statute, as to the objection thereto urged.

The next contention against the sufficiency of the complaint is that the act is unconstitutional, that being confessedly the foundation of the action. It is first contended that it violates section 19, article 4 of the state Constitution, which provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." It is contended that the subject is not expressed in the title, in that the title is: "An act regulating liability of railroads and other corporations except municipal," while the provisions of the act itself are, as claimed by appellant, to create a liability which up to that time had no existence. The precise question here involved was decided adversely to appellant's contention on a statute similar to our own, under a constitution an exact copy of our own, in this respect, in *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa, 338. We feel content to follow that case, without extending this opinion by repeating its reasoning, and, accordingly, hold that the subject is sufficiently expressed in the title.

The same rule has been, in effect, followed by this court in holding that the title of an act need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title. *Bitters v. Board, etc.*, 81 Ind. 125; *Crawfordsville, etc., Co. v. Fletcher*, 104 Ind. 97; *Benson v. Christian*, 129 Ind. 535; *State, ex rel., v. Kolsem*, 130

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Ind. 434; *State, ex rel., v. Roby*, 142 Ind. 168, 51 Am. St. 174, 33 L. R. A. 213; *Lewis v. State*, 148 Ind. 346.

In the course of some of the briefs filed in other cases involving the validity of the act, it is contended that the act is void, in that it violates section 22, article 4 of the state Constitution, providing that "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: \* \* \* regulating the practice in courts of justice." That the act does not violate, the provision quoted is settled by *Woods v. McCay*, 144 Ind. 316, and cases cited; *Mode v. Beasley*, 143 Ind. 306, and cases there cited; *Board, etc., v. State, ex rel.*, 147 Ind. 476. Also that it violates section 23 of the same article, requiring all laws to be of general and uniform operation throughout the State, where such a law can be made applicable. But that is a question for the legislature, whose determination is final and conclusive on the courts. *Mode v. Beasley, supra*, and cases there cited; *Wood v. McCay, supra*, and cases there cited.

It is next contended that the act violates section 23 of article 1 of the Constitution, providing that "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Railroad corporations are persons within the meaning of this provision of our bill of rights, and the equality clause of the fourteenth amendment to the Constitution of the United States. *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386; *Santa Clara Co. v. Southern Pacific R. Co.*, 118 U. S. 394; *Pembina, etc., Mining Co. v. Pennsylvania*, 125 U. S. 187. The inequality complained of is that corporations, except municipal, are made liable for damages caused to one of their servants by the negligence of a co-employee or fellow servant, without any negligence on the part of the employer, while other employers are left free from such liability to their employees.

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Appellant also contends that the act violates the equality clause of the fourteenth amendment of the Constitution of the United States, demanding for every person the equal protection of the laws. The same provision, quoted from the bill of rights in the Constitution of this State, is found word for word in the bill of rights of the constitution of Iowa. The supreme court of that state, in upholding the employers' liability act of that state, held that the provision mentioned in the bill of rights in the constitution of that state was, in effect, the same as the equality clause of the fourteenth amendment to the federal Constitution, and that the employers' liability act did not violate either constitution in respect to equality of laws or equality of rights secured by each of said provisions, in *Bucklew v. Central Iowa, etc., R. Co.*, 64 Iowa, 611, 21 N. W. 103. That decision rests largely on two decisions made upon the subject of the constitutionality of the employers' liability act of Kansas and that of Iowa in the Supreme Court of the United States. Mackey had recovered a judgment for \$12,000 damages against the Missouri Pacific Railway Company for injuries caused by a co-employee of that company, which on appeal was affirmed by the supreme court of Kansas. From that judgment the company appealed to the Supreme Court of the United States, on the ground that the Kansas statute violated the fourteenth amendment to the Constitution of the United States. But that court affirmed the judgment, holding that the act in no way infringed that amendment. *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 205. Mr. Justice Field, speaking for the court, there said: \* \* \* "The company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employees caused by the negligence or incompetency of a fellow servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications,

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or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow servants in the same common employment, and acting under the same immediate direction. \* \* \* Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company \* \* \* is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the 14th amendment. \* \* \* The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. \* \* \* The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of

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municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. \* \* \* A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed. \* \* \* But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public." A like decision was made by the same court, upholding the employers' liability law of Iowa, which has been in force in that state ever since 1862. *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210. The Iowa statute is expressed in fewer words and better language than our own. It reads thus: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." Section 1307 Iowa R. S. 1873.

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Herrick was injured in Iowa by the negligence of a fellow servant in the employ of said railroad company. He sued and recovered against the company on the Iowa statute in the state court of Minnesota, which judgment was affirmed in the supreme court of that state, upholding the constitutionality of the Iowa statute. *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 16 N. W. 413; *Herrick v. Minneapolis, etc., R. Co.*, 32 Minn. 435, 21 N. W. 471. On appeal to the Supreme Court of the United States the constitutionality of the Iowa statute was upheld on the authority of the *Missouri, etc., R. Co. v. Mackey*, 127 U. S. 205, as above stated.

Some ten or twelve states of the Union have such acts on their statute books and none of them have ever been held unconstitutional, while the following decisions of state supreme courts have held such legislation to be constitutional and valid. *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa 338; *Bucklew v. Central Iowa, etc., R. Co.*, 64 Iowa, 611; *Rose v. Des Moines, etc., R. Co.*, 39 Iowa 246; *Kansas, etc., R. Co. v. Peavey*, 29 Kan. 169; *Missouri Pacific R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Attorney-General v. Railroad Companies*, 35 Wis. 425; *Ditberner v. Chicago, etc., R. Co.*, 47 Wis. 138, 2 N. W. 69. The questions decided by this court in *Townsend v. State*, 147 Ind. 624, 62 Am. St. 477, 37 L. R. A. 294, are analogous to and on the same lines as the cases just cited.

Appellant's learned counsel have urged upon our attention *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, as probably declaring a different rule. The reference to that case is fortunate, because, while it does not in the least depart from the rule laid down in the two cases above cited, it lays down some principles governing the subject, doubtless in mind in both of the other judgments of the federal Supreme Court, but not deemed necessary in those cases to be fully stated. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "That such corporations may be classified for



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some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri, etc., R. Co. v. Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting on others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. \* \* \* But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. \* \* \* It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.”

Objection is made to the validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that

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their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, cannot be permitted to litigate the constitutionality of the act as to other corporations. *Henderson v. State, ex rel.*, 137 Ind. 552, 24 L. R. A. 469; *Board, etc., v. Reeves*, 148 Ind. 467; *Currier v. Elliott*, 141 Ind. 394. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

It is also urged, as an objection to the validity of the act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed as railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations to protect their employes. We therefore conclude that the act does not violate the Constitution, either federal or state.

It is next contended that the circuit court erred in sustaining the plaintiff's demurrer to the second paragraph of the defendant's answer. It sets up that on the 8th day of March, 1893, and prior to the defendant's injury, he became a member of the voluntary relief department of the Pennsylvania lines west of Pittsburgh, and was such member at the time he was injured and so continued long after his said injury; that the management of said department is under the charge of said lines west of Pittsburgh; that said fund is made up of stated contributions from said lines, and the employes thereon, and said lines guarantee the fulfillment of all the obligations of said department, and make up and pay all deficiencies in the amounts necessary to pay all benefits to its members. In becoming a member of said relief department

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he agreed to be bound by its rules and regulations, among which was that each member, on complying with its rules, was entitled to receive stipulated benefits on account of disability incurred by injury received to such member in the service of the company. This agreement is all set forth in the appellee's written application for membership, and signed by him; and among the stipulations contained therein, is the following, namely: "And I agree that the acceptance of benefits from the said relief fund for injury or death shall operate as a release of all claims for damages against said company arising from injury or death which could be made by or through me, and that I, or my legal representatives, will execute such further instrument as may be necessary formally to evidence such acquittance." And it is further averred that after receiving the injury complained of, while disabled thereby, he accepted benefits from said relief department to the amount of \$385.

But it is contended by the appellee that by the fifth section of the act we have been considering the contract set up in this answer as a bar is made void. The contract set up is shown therein to have been entered into after the act took effect and became a law. The section reads thus: "All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void." Section 7087 Burns 1894. The balance of the section makes the whole act apply to future injuries and not to past. The validity of this section is assailed on the grounds that it violates the bill of rights and the fourteenth amendment of the federal Constitution. What we have said as to the validity of the other parts of the act, under these constitutional provisions, is applicable to this section, and hence it must be held not to infringe them.

And it is further insisted by appellant that said section violates section 19 of article 4 of the state Constitution, in

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that the subject of the fifth section is not expressed in the title, nor properly connected with the subject expressed in the title. The prohibition of contracts releasing corporations from their liability, as prescribed in the act, is germane to and properly connected with that main subject of the act, and hence the matter of the fifth section thereof need not be expressed in the title. *State, ex rel., v. Roby*, 142 Ind. 168, and cases there cited; *Warren v. Britton*, 84 Ind. 14; *Bitters v. Board, etc.*, 81 Ind. 125; *Benson, Adm., v. Christian*, 129 Ind. 535; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Beams v. State*, 23 Ind. 111; *Bank of the State v. City of New Albany*, 11 Ind. 139; *State, ex rel., v. Sullivan*, 74 Ind. 121; *City of Indianapolis v. Huegele*, 115 Ind. 581; *Hunter v. Burnsville, etc., Co.*, 56 Ind. 213; *Walker v. Dunham*, 17 Ind. 483; *McCaslin v. State, ex rel.*, 44 Ind. 151; *State, ex rel., v. Kolsem*, 130 Ind. 334; *Shoemaker v. Smith*, 37 Ind. 122; *Crawfordsville, etc., Co. v. Fletcher*, 104 Ind. 97; *Barnett v. Harshbarger*, 105 Ind. 410; *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 69. We therefore hold that the fifth section is not invalid, because it is a matter properly connected with the subject of the act.

Assuming that it is valid, and makes a contract releasing or relieving corporations from liability under the act absolutely void, appellant's learned counsel contend that there is nothing in the agreement set forth in the second paragraph of the answer relieving or releasing the company from liability for negligence, or from any liability whatever. They say appellee "elected to accept benefits from the relief fund, and having done so he cannot maintain this action for damages. That is the essence of his agreement." Appellant's counsel further say in one of their briefs, that "the payment and acceptance of benefits under the terms of the contract in this relief fund is simply a compromise and settlement of the claim of the injured employe against the company." Let us suppose that the above statement is true; it is certainly the strongest and best statement that can be made of appellant's position.

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What is it that makes the acceptance of benefits from the relief fund a compromise and settlement of appellee's claim? Only one answer can be made to this question, and that is that the antecedent contract alone makes it such. There is no allegation in the answer that in accepting the benefits appellee made any agreement or compromise whatever, and there is no claim that he did. He simply accepted that which he had a legal and moral right to demand. His own contributions helped to create the fund, and his injury brought him within the rules and regulations entitling him to the benefits. So, even if it was a compromise and settlement, it was such wholly and solely by virtue of the antecedent contract—a contract executed before the injury occurred; and, that being so, it amounts to nothing more than an attempt to secure a release of future liability under the act, call it by whatsoever name we may. But such acceptance is not, in any proper or legal sense, a compromise and settlement of liability under the act. The language of the contract is: "And I agree that the acceptance of benefits from said relief fund shall operate as a release of all claims for damages against said company, arising from such injury or death," etc. So, by the express terms of the contract, it is a release, and not a compromise and settlement. The acceptance of benefits shall operate as a release. But what makes it so? If the antecedent contract was abrogated, the acceptance of benefits would have no effect whatever upon the question of appellant's liability under the act; because he had a legal and moral right, as before remarked, to demand and receive such benefits. So, if the release takes place, it is not by virtue of the acceptance, but it is by the force, vigor, and effect of the antecedent contract. It breathes that effect into the acceptance.

But it is contended that the contract does not, of itself, operate as a release of liability under the act. The only difference between it and a contract of absolute release is that the

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one would be unconditional while the other is conditional. The conclusion seems unavoidable that the contract here is a conditional release of appellant from liability under the act. The condition upon which it is to become absolute is the acceptance of benefits from the relief fund. Section 5 of the act makes "all contracts \* \* \* by any corporation releasing or relieving it from liability" under the act "null and void."

Appellant's learned counsel contend that an exact copy of this contract was held valid in the following cases: *Johnson v. Philadelphia, etc., R. Co.*, 163 Pa. St. 127, 29 Atl. 854; *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529, 44 Am. St. 628, 30 Atl. 492; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; *Donald v. Chicago, etc., R. Co.*, 93 Iowa 184, 33 L. R. A. 492, 61 N. W. 971. The first three cases just cited were decided in states not having employers' liability acts forbidding contracts of this kind in force at the time the injury sued for occurred. And they proceeded upon the sole ground that the contract did not violate public policy, and therefore they were upheld. But the Iowa case was decided in a state having in force at the time such an act. But in that case the injury resulted in death and the administrator of the deceased had recovered a judgment against the company for the benefit of the mother of the deceased on account of his death, on a similar statute to our own. The deceased was a member of the relief association very similar to the one here involved. The case decided in *Donald v. Chicago, etc., R. Co.*, *supra*, was a suit by the mother against the relief association for the \$500 death benefits provided by the rules of the association. The case was decided against her because of the following stipulation in the contract signed by the deceased when he became a member of the relief association, namely: "Should a member or his legal representative bring suit against the company \* \* \* for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be

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made until such suit is discontinued; and if suit shall proceed to judgment or shall be compromised, all claims upon the relief fund for benefits on account of such injury or death shall be thereby precluded." That contract does not seek to avoid the liability of the company under the Iowa act, and hence was a perfectly legal contract. As before observed, the other cases involved the question whether such a contract as that now before us was invalid because of its violation of public policy. Without either approving or disapproving of the rule laid down by the Pennsylvania supreme court and our own Appellate Court, yet the United States Circuit Court for the district of Colorado decided the question the other way in a strong and able opinion in *Miller v. Chicago R. Co.*, 65 Fed. 305; and we think there is a marked distinction in the rule where a contract is charged with violating public policy and where it contravenes a positive statutory prohibition, and especially where the statute provides that the inhibited contract shall be null and void. In *Barrett v. Carden*, 65 Vt. 431, 36 Am. St. 876, the supreme court of Vermont said: "The defendant insists that the alleged undertaking of the plaintiff is contrary to public policy, and that for this reason the bond should be declared void. Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before a court is justified in pronouncing an instrument void on this account. In *Richmond v. Dubuque, etc., R. Co.*, 26 Iowa, 191, it is said: 'that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' \* \* \* In *Richardson v. Mellish*, 2 Bing. 229 (9 Eng. Com. L. 558), Sir James Burrough said: 'I protest as my lord has done against urging too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may

lead you from the sound law. It is never urged at all but when other points fail.' In *Walsh v. Fussell*, 6 Bing. 169 (19 Eng. Com. L. 83), Lord Chief Justice Tindale, in pronouncing judgment, said: 'It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law or the direct violation of any statute, and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public.' "

As was said in *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. 793, 21 L. R. A. 617: "Where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. \* \* \* Now, the intention of the contract was to contravene the statute, and this intention is revealed in the contract. This renders the contract vicious and unenforceable."

An eminent author says: "By public policy is intended that principle of law which holds that no citizens can lawfully do that which has a tendency to injure the public, or which is against the public good. Courts will not declare contracts void on grounds of public policy except where the case is free from doubt, and where an injury to the public interest clearly appears. A doubtful matter of public policy is not sufficient to invalidate a contract." 2 Beach Modern Law of Contracts, section 1498, and authorities there cited.

It might be difficult to say that such a contract has a tendency to injure, or is against the public good, beyond all doubt. On the other hand, the same author says, section 1447, that: "Contracts requiring the performance of acts forbidden by statute, or tending to promote such acts, are void, even though the statute does not declare them void." See the authorities there cited. The same author, in section 1443, says: "Whatever tends to interfere with the bene-



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ficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful; and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated. \* \* \* The law attempts to close the doors to temptations by refusing such parties recognition in the courts." See authorities there cited.

It is laid down in 3 Am. & Eng. Ency. of Law, 872, that: "Where a transaction is forbidden by a statute, it is void; the grounds of the proposition are immaterial." As we have before said, the contract in question is a release of appellant's liability under the act upon a certain condition. That it is a conditional release of such liability, dependent upon the happening of the condition, namely, the acceptance of said benefits by appellee, there can be no doubt. If that condition happens, as it did, appellant's liability under the act is released by virtue of the antecedent contract, if it is enforced. If it is enforced it must be so done in violation of the statute which makes all such contracts null and void. That certainly more than tends to obstruct both the letter and spirit of the statute. Our cases are to like effect in holding that a contract in violation of a statute is void. *State Bank v. Coquillard*, 6 Ind. 232; *Cassaday v. American Ins. Co.*, 72 Ind. 95. And the same is true if any part of the contract is in violation of the law and the consideration unseverable. *Daniels v. Barney*, 22 Ind. 207; *Case v. Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294; *Woodford v. Hamilton*, 139 Ind. 481; *Sandage v. Studebaker, etc., Co.*, 142 Ind. 148; *Sullivan v. State, ex rel.*, 121 Ind. 342.

But the contract is only conditionally in conflict with the statute; that is, if the condition never happens, it does not and never can conflict with the statute. But it is equally true if the condition does happen it will directly conflict with the statute. One of the most learned of law writers upon this topic says: "A condition is a limitation making a

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contract arbitrarily dependent on an event at the time uncertain." 1 Wharton Law of Contracts, section 545. And in section 548 the same learned author says: "The promisor is not to be bound only in the future; he is bound from the time he makes the promise; and the title he passes vests subject to the condition. Any intermediate disposition of the title made by the promisor before the happening of the condition is subject to the condition. \* \* \* The promisor, also, who agrees to convey an estate on a future contingency, is liable in damages if he makes his compliance with his promise impossible, or subjects the property to waste." And in section 551 he further says: "The same may be said of all contracts to be performed on the happening of a certain event. The contract binds from the time it is made, and ceases to bind on the non-occurrence of a certain event, which is, therefore, in this sense, a condition subsequent." To the same effect is Clark Contracts, Hornbook Series, section 277, p. 663.

If we were even mistaken in construing this contract as a conditional one, so as to bring it within the principles above laid down and within the condemnation of the statute in question, it unquestionably falls within the principle laid down by Wharton, thus: "The prohibition of a statute cannot be evaded by putting a contract in a shape which, while nominally not inconsistent with the statute, virtually contravenes its provisions. This has been frequently held with regard to stipulations evading usury statutes, and with regard to assignments evading bankrupt laws. If a contract conflicts with the general policy and spirit of a statute governing it, it will not be enforced, although there may be no literal conflict." 1 Wharton Law of Contracts, section 362. In *State, ex rel., v. Forsythe*, 147 Ind. 466, 33 L. R. A. 22, it was said: "In chapter IV, section 1, of Maxwell on the Interpretation of Statutes, under the title of 'Construction to Prevent Evasion,' it is accordingly said, at pages 133 and 134: 'It is the duty of the judge to make

such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined. *In fraudem legis facit, qui, salvis verbis legis, sententiam ejus circumvenit*; and a statute is understood as extending to all such circumventions, and rendering them unavailing. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because, according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment they brush away the cobweb varnish, and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is the subject of construction; and if it is found to be in substance within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked."

We are therefore of opinion that the contract set up in the second paragraph of the answer is in contravention of the statute, and hence, by force thereof, the contract so set up is null and void; and that being so, said answer was bad, and the circuit court did not err in sustaining the demurrer thereto for want of sufficient facts.

It is complained under the motion for a new trial that the circuit court erred in excusing on its own motion the juror Overholser, who it is alleged was a competent juror, over ap-

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pellant's objection. But it is not shown that the jury which was finally impaneled was not a fair and impartial jury. In such a case the matter is very much in the discretion of the trial court, and no error is committed where no injury results from the court's action in excusing the juror. *DePew v. Robinson*, 95 Ind. 109. It is not even claimed that any injury resulted therefrom. We therefore conclude there was no error committed in excusing the juror.

It is further contended that the seventh item in the special verdict is not supported by the evidence. It reads thus: "We further find that, under the rules of the defendant company governing the operation of defendant's freight trains in cases where it became necessary for brakemen to go between defendant's cars, attached to the engine drawing the same, for the purpose of making couplings, it was the duty of the engineer in charge of the engine of said train, after receiving a signal from a brakeman, to stop the engine and train for the purpose of allowing such brakeman to pass between the cars thereof and make a coupling, to obey a signal and stop the engine and train, and so remain until receiving a signal from some member of the train crew to back or pull forward." Counsel say: "The evidence does not sustain this finding. There was no evidence of such a rule." The finding is not that there was such a rule, but that, "under the rules of the defendant," not rule, "it was the duty of the engineer" to do certain things. Those rules might have been such as were adopted by the company, or such as by long usage and custom had become understood as incumbent on appellant's servants. We think there was evidence sufficient to support this finding.

The tenth finding was objected to because the evidence on that branch of the verdict was not sufficient to sustain it, but there was evidence sufficient to support it, though there was strong conflicting evidence. We can only look to that part of the evidence that supports the finding.

It is also complained that the circuit court erred in refus-

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ing to require the jury to return to their room and insert in their special verdict certain facts specified. To have sustained the motion would have been an invasion by the court of the province of the jury to determine the facts. If a special verdict fails to find material facts, within the issue, which were established by the evidence, the remedy is not by a motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved. *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327, and cases there cited; *Vinton v. Baldwin*, 95 Ind. 433, and cases there cited; *City of Lafayette v. Allen*, 81 Ind. 166, and cases cited.

Overruling appellant's objection to the question and answer of the witness Ballard is also urged as error. The appellee's counsel had asked the witness the question what danger there was to appellee's life at the time witness saw him, and he answered, "I considered him in a great deal of danger; a man continuing in that condition could not live many days." Appellee's counsel immediately withdrew the evidence, and the court, at the request of appellant's counsel, instructed the jury not to consider such evidence. There was no available error in the ruling.

Complaint is made of the third instruction given by the court: "That in estimating the plaintiff's damages it is proper \* \* \* that you should take into consideration the plaintiff's physical and mental suffering." In *Wabash, etc., R. Co. v. Morgan*, 132 Ind., at p. 438, an instruction "that in making such estimate the jury should take into consideration appellee's physical and mental suffering if any were caused by and arising out of the injury" was upheld as not an "erroneous statement of the rule governing the assessment of damages contained in either of the instructions." There was no error in giving the instruction.

The fourth instruction is complained of, reading, as appellant's counsel say in their brief, thus: "The jury are instructed that if they find that the plaintiff has proved by a preponderance of the evidence the injuries he has sustained

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as charged in the complaint, then every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time with reference to his condition and ability to earn money in his business or calling, his loss from permanent improvement of his physical powers, his pain and suffering already endured and that may be endured from his injuries in the future, his personal disfigurement; and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case." The appellee's counsel have copied the same instruction into their brief, except the word printed "improvement" in appellant's copy of the instruction, is printed "impairment" in appellee's copy. Neither brief cites us to the place in the transcript where the instruction can be found, and we have spent some time hunting for it, without success. Under such circumstances we are justified in assuming that the word "improvement" in appellant's copy is a clerical or typographical error, and that the real instruction had the word "impairment" in it instead of the word "improvement" as set out in appellant's brief. Indeed, if the word "improvement" were in the transcript, instead of the word "impairment," it is so manifestly a clerical mistake in copying the instruction that we are authorized to read it "impairment" instead of "improvement." *Landon v. White*, 101 Ind. 249; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75. With that reading the instruction is correct. *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 438. We have thus patiently gone over all the rulings of the circuit court urged and properly presented here as error, and conclude that the circuit court did not err in overruling the motion for a new trial. The judgment is affirmed.

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## PEERLESS STONE COMPANY v. WRAY.

[No. 18,418. Filed Oct. 11, 1898. Rehearing denied Dec. 30, 1898.]

**MASTER AND SERVANT. — Negligence. — Contributory Negligence. —**

**Complaint.**—A complaint in an action for damages for injuries sustained by plaintiff while engaged in defendant's stone quarry alleged that a large bank of clay, of original deposit and stone, about seven feet in length and eight feet high, and one foot wide, and weighing about five tons, that had been loosened by the removal of stone, and left unsupported, fell upon plaintiff; that the bank was of a brownish color, and appeared to plaintiff to be a ledge of stone, and the fact that it was a bank of clay was wholly unknown to plaintiff; that banks of clay were unusual in said quarry; that plaintiff when injured was in the line of his duty in the service of defendant, and had no knowledge that the bank had been loosened and left unsupported and was in danger of falling; that plaintiff in no way contributed to his injuries; that defendant well knew that the bank was not a ledge of stone, but a bank of clay and stone, loose and unsupported, and was in danger of falling, and carelessly and negligently failed to notify plaintiff thereof, although defendant well knew that the duties of plaintiff required him to pass beneath and close to said bank; that the superintendent of the quarry was above and near said bank, and saw that it was a mud seam, and had been loosened and was liable to slide down at any time. *Held*, that, as against demurrer, the complaint alleged facts sufficient to show negligence of defendant causing the injury, and freedom from contributory negligence on the part of plaintiff. pp. 28, 29.

**LIMITATION OF ACTIONS.—Amended Complaint.**—An amended complaint which does not introduce a new cause of action has reference to the time of the filing of the original complaint, and a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced. p. 30.

**INTERROGATORIES TO JURY.—When Not in Conflict with General Verdict.—Master and Servant.**—Answers to interrogatories in an action for damages on account of injuries sustained by plaintiff while at work in defendant's stone quarry by reason of a bank of clay falling upon him, that plaintiff had worked in the quarry for over a year and knew that mud seams and dry seams were usual in the quarry; that he received no specific command on the day of the injury to go to the place where he was at work when injured; that at the time he went beneath the embankment, and before it fell upon him, he examined the embankment with the eye and was prevented

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by sand and mineral deposit from seeing the exact character of the mud bank are not in irreconcilable conflict with a general verdict for plaintiff. pp. 30-32.

From the Monroe Circuit Court. *Affirmed.*

*M. F. Dunn*, for appellant.

*J. H. Loudon, T. J. Loudon and J. R. East*, for appellees.

HOWARD, J.—This is the third appeal in this case. *Peerless Stone Co. v. Wray*, 10 Ind. App. 324, and 143 Ind. 574. The judgment in favor of appellee was reversed on each of the former appeals, by reason of the insufficiency of the complaint.

The record before us shows that an amended complaint, in two paragraphs, was filed by appellee on March 31, 1897. It is alleged in the first paragraph of this complaint that on June 8, 1892, appellee and other employes were engaged at work in appellant's stone quarry, near Bedford, in Lawrence county, and that while appellee was then and there engaged in his duties "A large bank of clay dirt, of original deposit, and stone, about seven feet in length and eight feet high and one foot wide, and weighing about five tons, that had been loosened by the removal of stone and left unsupported, fell on, upon and against said plaintiff with great force and weight, and bruised and crushed said plaintiff to the ground and broke several bones in his body and cut and bruised him so that said plaintiff was unable to move, and was completely disabled and permanently injured; that said bank, where said plaintiff and other employes of said defendant were at work, was of a brownish gray color, and appeared to said employes to be a ledge of stone; that said plaintiff considered it a ledge of stone, and the same was not so exposed to ordinary view before it fell as to indicate anything else than a ledge of stone or a dry, and the fact that it was a bank of clay dirt and stone was wholly unknown to said plaintiff; that they were unusual in said quarry; that said plaintiff when so injured was in the line of his duty in



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the service of the defendant, in performing the duties required of him by said defendant, and had no knowledge that said bank of clay dirt and stone had been loosened and left unsupported and was in danger of falling, and had no knowledge whatever that there was any danger in passing close to said bank of clay dirt and stone, but was in entire ignorance of the unsafe condition of said bank." General allegations are also made showing entire absence of fault on the part of appellee in causing his own injuries, and that he "in no way whatever contributed to the same."

It is further alleged: "That said defendant well knew that said bank was not a ledge of stone, but was a bank of clay dirt and stone, loose and unsupported, and was in danger of falling, but carelessly and negligently failed to notify said plaintiff or call his attention to the fact that said bank of clay dirt and stone was loose and unsupported, and was in danger of falling, or that there was danger in passing close to said bank of clay dirt and stone, although said defendant well knew that the duties of said plaintiff required him to pass beneath and close to said bank. \* \* \* That the superintendent of the quarry was up on the bank, near said bank of clay dirt and stone, and saw that the same was a mud seam and had been loosened and was liable to slide down at any time. That said plaintiff by reason of said injuries \* \* \* was totally disabled from manual labor during his natural life."

Counsel for appellee in contending that this complaint was good upon demurrer, as containing at least an imperfect statement of all that was necessary to be alleged to show negligence by appellant in causing the injuries sustained by appellee, and freedom from fault on his part in contributing to these injuries, yet admits that the complaint might, perhaps, have been "more specific in some particulars." With this view we are inclined to agree. There is a vagueness of statement as to some essential allegations that is quite objectionable; but the necessary facts are at least imperfectly, as

we think, set out. The faults indicated on the former appeal seem to have been corrected.

The chief objection now made to the complaint must, in our view, be held untenable. It is, that the action is shown to be barred by the statute of limitations. This objection is based on the circumstance that it appears that the amended complaint was filed more than two years after the cause of action accrued. There is nothing shown in the pleading itself, or in appellant's brief in relation thereto, that should take this case out of the general rule, namely, that an amended complaint, as well as an amendment to a complaint, if it does not introduce a new cause of action, has reference to the time of the filing of the original complaint. As stated by Judge Mitchell, in *Chicago, etc., R. Co. v. Bills*, 118 Ind. 221, "An amended complaint has relation ordinarily to the date of the commencement of the action, and is regarded as a matter occurring in the continuation or progress of the original cause. Unless, therefore, some new claim or title not previously asserted, is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced." In the case at bar it is not contended that any cause of action is set up in the amended complaint different from that alleged in the original complaint.

There was a trial by a jury, resulting in a verdict and judgment in favor of appellee. Afterwards a new trial was granted, and the venue was changed from the regular judge to the special judge below. The second trial resulted also in a verdict and judgment in favor of appellee.

The next ruling of the court discussed in appellant's brief is the refusal to render judgment in favor of appellant on the answers of the jury to special interrogatories, notwithstanding the general verdict. In answer to appellant's interrogatories the jury found: That at the time of appellee's injury mud seams and dry seams were usual in appellant's quarry; that appellee had then worked in the quarry for over

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a year; that the quarry covered about one-half an acre; that appellee received no specific command on the day of his injury to go to the place where he was at work; that at the time appellee went beneath the embankment, and before it fell upon him, he examined the embankment "with the eye;" that appellee was prevented by "sand and mineral deposit" from seeing the exact character of the mud bank; that he was aware of the fact that mud banks and seams were usual in appellant's quarry; that he could not discover at any distance from the bank that it was of clay; that he went beneath the bank without touching it; that he could not "by sight, by touch, by his hands, or by examination" discover why the bank was not solid stone or of an original deposit; that the stone which had supported the bank had been removed about five minutes before the bank fell upon appellee; and that appellee, as he approached the embankment and original deposit which fell upon him, could not have seen the character of the same had he looked and observed.

In answer to interrogatories submitted by appellee the jury found further: That one Robert McKinley was appellant's superintendent, and in full charge of the quarry on the day of the accident; that the superintendent had one of his feet upon the upper edge of the bank of clay and dirt at the time it fell and injured appellee, and that by so standing on the bank he aided in causing it to fall upon appellee; that for two or three days prior to appellee's injury the superintendent knew that the bank was what was known as a mud seam, and could have known at this time that it would probably fall when the stone in front of it was removed; that said superintendent knew that said bank without being propped was dangerous and unsafe to appellee long enough before appellee's injury to have warned him and prevented the same; and that there was no mud seam on the floor on which appellee was working except the one that fell upon him.

The general verdict of the jury was for the appellee and

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against the appellant, and it seems very clear that there is nothing in the answers to the special interrogatories which is in irreconcilable conflict with this general verdict.

Counsel for appellant assumes many facts as found by the jury which the answers themselves fail to bear him out in. The rule is that the answers must be in irreconcilable conflict with the general verdict in order to justify the court in giving judgment upon the interrogatories against the verdict; but counsel would seem to argue as if the rule were that the answers must not be reconciled with the general verdict if it be possible to interpret them otherwise. In this case, however, even without resorting to the rule that all intendments are to be taken in favor of the general verdict, but taking the natural and ordinary meaning of the language used, there appears to be no conflict whatever between the answers to interrogatories and the general verdict of the jury. The answers themselves show that the judgment should be in favor of the appellee.

While mud seams and dries (the former dangerous, the latter harmless) were usual, that is, liable to be discovered in the quarry, yet it is found that there was no mud seam on the floor where appellee worked except the one that injured him. This he examined as he approached it, and it had all the appearance of solid rock being covered with a coat of sand and mineral matter, and he could not discover that it was anything different from the rest of the ledge. He was not required to make particular inspection with pick or other tool every time he approached the face of the stone wall. Obvious dangers, open to ordinary observation, he was bound to guard against, but not latent defects, to be discovered only on particular inspection. It is not to be expected that appellee should have received a specific command to go up to the face of the quarry every time he went there in the performance of his daily duties. It would be a dilatory workman who should wait for such specific orders every time he picked up a lot of tools or engaged in any other task required

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by the duties of his employment. The superintendent, on the other hand, whose duty it was to make inspection and who knew the condition of the bank, was up above the bank long enough to have warned appellee of the danger; he there saw the character of this mud bank, which was wholly unknown to appellee. The jury find that the superintendent knew for two or three days before the accident that the bank was a mud seam, and not a part of the solid rock, and ought to have known that it was liable to slide down the moment the rock in front of it was removed; yet he placed his foot upon this treacherous mass a little before it came down, and thus aided in causing it to fall upon appellee.

In arguing that the evidence does not support the verdict, counsel for appellant indulges in extended verbal criticism. It is not, however, seriously contended that there was not evidence adduced to support the verdict, but, rather, that the preponderance of the evidence was in favor of the appellant. Indeed, counsel goes so far, notwithstanding the well settled practice in this jurisdiction, as to ask this court to weigh the evidence. "It was the duty of the lower court," says counsel, "after the jury had returned its verdict, to decide, by weighing the evidence, whether or not the preponderance of the evidence was with the plaintiff or with the defendant. If the court below—and courts below sometimes so do—failed legally, under the evidence now before this court in the bill of exceptions, to weigh the preponderance of evidence, will this court not weigh it?" The court below saw and heard the witnesses; and the law, in authorizing the granting of a new trial, concedes that the trial judge may determine whether the jury have failed properly to weigh the evidence or not. This court, however, has not had the opportunity of either hearing or seeing the witnesses, and can determine from the cold writing alone whether there was competent and sufficient evidence adduced to sustain the verdict returned by the jury. Having decided that ques-

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tion our jurisdiction as to the evidence is exhausted. It is, besides, to be noted in this case that after the reversal of the former judgment by this court, the court below did grant a new trial at appellant's request, and also that there was a change of venue from the judge who presided at the first trial. There ought to be some end to litigation.

Some objection was made to comments by counsel for appellee upon certain evidence as to appellee's family. The evidence was admitted without objection; a part of it, indeed, being evidence introduced by appellant. The remarks of counsel were by way of recital and description, and were, in effect, withdrawn when objected to. We cannot conceive of any harm thereby done to appellant. The objection if any should have been made to the evidence itself. Judgment affirmed.

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 DAVIS v. THE STATE.
 

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[No. 18,499. Filed Nov. 18, 1898. Rehearing denied Dec. 30, 1898.]

**CRIMINAL LAW.—Indeterminate Sentence Law.—Constitutional Law.**  
*—Assault and Battery with Felonious Intent.*—The act of March 8, 1897 (Acts 1897, p. 219), known as the indeterminate sentence law, is not an *ex post facto* law within the meaning of section twenty-four, article one of the bill of rights as applied to an indeterminate sentence upon conviction of assault and battery with felonious intent, the crime having been committed before the passage of the act, as the new law does not add to or increase the punishment of the offense beyond that existing at the time of its commission. *pp.* 36-37.

**SAME.—Indeterminate Sentence Law.—Constitutional Law.—Repeal of Good Time Law.**—The act of March 8, 1897, (Acts 1897 p. 219), known as the indeterminate sentence law, is not *ex post facto* in that it repeals the good time law, as the good time law relates only to rules for the government of the prison officials, and the indeterminate sentence law substitutes a new and different method of crediting good time to the convict. *p.* 37.

**SAME.—Instructions.—Self-Defense.**—An instruction to the effect that a person is not justified in using a deadly weapon in defense of his person when assaulted by one who has no weapon in his hands, nor the appearance thereof, is erroneous. *pp.* 37, 38.

**INSTRUCTIONS.—Correct as Abstract Proposition of Law.**—An instruc-

152	34
100	310
152	34
161	384

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tion which leaves the jury in doubt or uncertainty as to how it should be applied to the evidence, although correct as an abstract proposition of law, is erroneous. pp. 38, 39.

From the Clark Circuit Court. *Reversed.*

M. Z. Stannard, for appellant.

W. L. Taylor, Attorney-General, W. A. Ketcham, Merrill Moores and Dickey & Aydelotte, for State.

MCCABE, J.—The appellant was tried by a jury in the Clark Circuit Court on an indictment charging him with an assault perpetrated April 13, 1896, on one Thomas Glynn, with the felonious intent to murder the said Glynn. The jury found appellant "guilty of the crime charged in the indictment, and that he be fined in the sum of \$50, and that his age is fifty-four years." On this verdict the circuit court rendered judgment that he be confined in the state prison not less than two and not more than fourteen years, and for the fine of \$50 and costs, over appellant's motions for a new trial, for a *venire de novo*, and in arrest of judgment. The assignment of errors calls in question these several rulings as the sole grounds on which a reversal of the judgment is sought. Under the motions for a *venire de novo* and in arrest of judgment, it is contended by appellant that the act approved March 8, 1897, the only law authorizing such a verdict and judgment, known as the indeterminate sentence law, is unconstitutional as to this case, because, as applied to this case, it is an *ex post facto* law, the alleged crime having been committed before the passage of the act. The constitutionality of the act in all other respects has recently been upheld by this court in *Vancleave v. State*, 150 Ind. 273; *Wilson v. State*, 150 Ind. 697; *Müller v. State*, 149 Ind. 607, 40 L. R. A. 109.

Section 24 of article 1 of the bill of rights in the Constitution provides that "No *ex post facto* law \* \* \* shall be passed." Section 69 Burns 1894, section 69 Horner 1897. The question is what is an *ex post facto* law? This court, as

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far back as 1822, defined the meaning of the phrase as follows: "The words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy." *Strong v. State*, 1 Blackf. 193. To the same effect are *Dinckerlocker v. Marsh*, 75 Ind. 548; *Hicks v. State*, 150 Ind. 293; *Commonwealth v. Mott*, 21 Pick. 492; *State v. Arlin*, 39 N. H. 179; *Mullen v. State*, 31 Ill. 444. At the time of the decision in *Strong v. State*, *supra*, the same provision, as to *ex post facto* laws, existed that exists now. Section 69, R. S. 1843, article 1. In that case the punishment of the offense was changed by law from whipping not exceeding 100 stripes to confinement in the state prison, after the commission of the offense and before the conviction. The sentence to a fine and confinement in the penitentiary at hard labor for a year and a day was affirmed as not being *ex post facto*. If the substitution of confinement in the state prison at hard labor for a period not exceeding seven years in place of whipping not exceeding 100 stripes, as the statute in that case provided, being enacted after the offense was committed, could not be deemed to add to or increase the punishment by the new law, and hence not *ex post facto*, much more can it be justly held that the indeterminate sentence law does not add to or increase the punishment of appellant's offense, beyond that existing at the time of its commission. The punishment by law at the time of the commission of the offense charged in the indictment was and is imprisonment in the state prison not more than fourteen years nor less than two years, and a fine not exceeding \$2,000. The indeterminate sentence law has not changed this, but only prescribes a different method of fixing the amount of punishment within



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those limits. And taking that whole law together, and reading it into the judgment of conviction in its reformatory character, it mitigates the severity of the punishment as prescribed in the criminal code, as we substantially held in *Miller v. State*, 149 Ind. 607, and hence it does not add to or increase the punishment, and is therefore not an *ex post facto* law as applied to this case. Such is the rule held in *Commonwealth v. Brown*, 167 Mass. 144; *In re Conlon*, 148 Mass. 168; *State, ex rel., v. Peters*, 43 Ohio, St. 629.

The contention that the act is *ex post facto* because it repeals the good time law cannot be sustained. That law relates only to rules for the government of the prison officials. The indeterminate sentence law simply substituted a new and different method of crediting good time to the convict. The good time law does not apply to one sentenced under the indeterminate sentence law or the reformatory act.

Under the motion for a new trial, numerous instructions are complained of, one of which, given by the court on its own motion, is as follows: "12. Even if you believe the prosecuting witness made a rush or attack upon the defendant when he came out of his house, if you believe the prosecuting witness had no weapon in his hands or appearance thereof, then I instruct you that the defendant was not warranted in using a deadly weapon."

And another, given at the request of the prosecuting attorney, was as follows: "11. An assault or an assault and battery by a person upon another with his hands, arms, or head, or the force or momentum of his body, does not justify the use of a deadly weapon."

The defendant was a one armed man, his right arm having previously been amputated at the shoulder, and the evidence tended to show that Glynn and others had engaged in a quarrel with defendant in Jeffersonville, and that Glynn had drawn a beer faucet on defendant as if to strike him; that defendant immediately left them, and went to his residence in said city, and was followed by said Glynn along the

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streets thereof; that defendant went into his house and got a revolver; and that Glynn, being a stout, robust man, stopped at defendant's front door, and, on defendant's coming out of his house, Glynn made a rush at defendant, to attack him, in a state of intoxication and a rage and passion, and defendant shot at him. These instructions inform the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person. If that is the law, then in every conceivable case of a violent attack upon one by another, no matter what the circumstances may be, no matter what the disparity between the ages and physical strength of the two may be, the assaulted party must stand and take his chances of being knocked down and stamped into a jelly, or of being choked to death before he can lawfully use a weapon in his defense. Though the appearance and circumstances of the assault were such as to induce the reasonable belief to be honestly entertained by the defendant that his life was in danger, or that he was in danger of great bodily harm from the assault, he could not lawfully use a deadly weapon to repel such assault, unless the assailant had a weapon in his hands, or the appearance thereof, no matter how many he had about his person. This is not the law. *Presser v. State*, 77 Ind. 274-278; *Batton v. State*, 80 Ind. 394; *McDermott v. State*, 89 Ind. 187. But we have a case where an assailant was convicted of manslaughter, where he used nothing but his hands, thereby choking his victim to death, and that judgment was affirmed in this court. *Shields v. State*, 149 Ind. 395.

It is insisted by the State, however, that these instructions were correct as abstract propositions of law, and, construed along with other instructions given, make them altogether as a whole a correct statement of the law. As was said by this court in *Abbitt, Adm., v. Lake Erie, etc., R. Co.*, 150 Ind. 498: "But even though the instruction in question, as formulated, upon any view, could be said to be a correct ex-

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position of the law, which at least may be asserted as doubtful, still it may be said that it is so framed as to present the question to the jury as an abstract proposition, and not in a manner applicable to the particular evidence in this case. To say the least, it certainly would have left the jury in doubt or uncertainty as to how it should be applied to the evidence in this case, and for this reason alone the court was justified in refusing to give it. An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane."

In any view of the case, the giving of the instructions quoted was erroneous. Therefore the court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded with instructions to sustain the defendant's motion for a new trial. The clerk is directed to issue the proper order for the return of the prisoner.

ROWND ET AL. V. THE STATE ET AL.

[No. 18,643. Filed Nov. 18, 1898. Rehearing denied Dec. 30, 1898.]

**MARSHALING ASSETS. — Liens. — Judgments. — Complaint.** — A complaint by a judgment creditor to set aside certain chattel mortgages upon property levied upon, and to sell said encumbered property, and marshal the assets and distribute the same to the persons holding liens thereon according to their priority, and for the appointment of a receiver is sufficient without any allegations as to fraudulent intent and purpose in the execution of the mortgages. *p. 41.*

**SAME. — Liens.** — Where one has a lien on two or more funds as security for a debt, and another has a lien on one only of such funds, and others have liens, some on all of such funds, and some only on a part thereof, a bill to marshal the assets will lie. *p. 41.*

**PLEADING. — Demurrer. — Joint Demurrer. — Practice.** — A demurrer to two paragraphs of answer for the reason that "neither of said paragraphs of answer states facts sufficient to constitute a good defense to either of said cross-complaints," is joint, and not several, and if either paragraph of answer was good the demurrer was properly overruled. *p. 42.*

**APPEAL AND ERROR. — Evidence. — Weight of. — Fraud.** — Where there

152	30
154	228
156	545
152	30
157	210
152	30
156	195
152	30
1171	52

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is competent evidence, either direct or circumstantial, which sustains the finding by the trial court of fraud in the execution of a mortgage to secure creditors, the Supreme Court will not disturb the finding on the weight of the evidence. *p. 43.*

**PRINCIPAL AND SURETY.**—*Mortgage Executed by Principal in Fraud of Creditors.*—A surety who accepts a mortgage, obtained by his cosurety, executed by the principal to such sureties jointly, in fraud of creditors, takes the same charged with all of the infirmities affecting it by reason of the participation of the cosurety in the fraud, although such surety had no knowledge of the mortgage until after it was executed and recorded. *p. 45.*

**APPEAL AND ERROR.**—*Rehearing.*—A rehearing will not be granted in order that either party may file additional briefs, or request an oral argument; requests for time to file additional briefs, and for an oral argument, must be seasonably made. *p. 46.*

**SAME.**—*Rehearing.*—The fact that the Clerk of the Supreme Court may have expressed an opinion as to when a case would be decided, or that the parties were negotiating as to a compromise of the cause, is no excuse for a failure to make application for time to file additional briefs, and for an oral argument before the decision of the cause. *p. 46.*

From the Clark Circuit Court. *Affirmed.*

*Rankin & Rector, T. E. Powell, C. L. Jewett and H. E. Jewett,* for appellants.

*W. A. Ketcham,* Attorney-General, for State.

**MONKS, J.**—This action was brought by the appellee, the State of Indiana, against appellants. Appellants Rownd and Gray alone assign errors. Those not waived are as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) The court erred in overruling the demurrer of the appellants Robert M. Rownd and David S. Gray to the second paragraph of the answer of the appellee, the State of Indiana, to the cross-complaint of said appellants Rownd and Gray. (3) The court erred in overruling the demurrer of the appellants Robert M. Rownd and David S. Gray to the third paragraph of the answer of the appellee, the State of Indiana, to the cross-complaint of the appellants Rownd and Gray. (4) The court erred in

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overruling the joint and several motions of Rownd and Gray for a new trial.

It is first insisted that the complaint stated no cause of action against Rownd and Gray. The State of Indiana recovered a judgment in the court below against one Patton who owned manufacturing plants in Clark and Delaware counties in this State, and caused executions to be issued on said judgment to said counties and levied upon said plants. Said property appeared to be encumbered by liens held by different persons, and the State commenced this action for the appointment of a receiver, to set aside certain chattel mortgages upon a part of said property levied upon, (one of which was held by the appellants, Rownd and Gray), on the grounds that they were executed to hinder, delay, and defraud the creditors of said Patton, and to sell said encumbered property and marshal the assets of said Patton and distribute the same to the persons holding liens thereon according to their priority.

The only objection urged against the complaint by Rownd and Gray is, that the allegations of fraud are not sufficient to avoid the mortgage executed to them by said Patton, and that therefore the complaint did not state facts sufficient to constitute a cause of action against them. The complaint was sufficient as to said appellants, even if all the allegations of fraudulent intent and purpose, in the execution and acceptance of said mortgage, had been omitted therefrom. It is well established that courts of equity have jurisdiction to marshal the assets and securities of a debtor. The general principle is that if one party has a lien on or an interest in two or more funds as security for a debt, and another party has a lien on or interest in one only of those funds for another debt, and others have liens, some on all of said funds, and some only on a part thereof, as in this case, that a bill to marshal the assets will lie. 1 Story Eq. Jur., Chapter 13; Pom. Eq. Jur., section 112, section 410, section 186, and section 1414; *Ostrander v. Weber*, 114 N. Y. 95; *Reilly*

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v. *Mayer*, 12 N. J. Eq. 55; *Van Mater v. Ely and Holmes*, 12 N. J. Eq. 271.

It is next insisted that the court erred in overruling the demurrer of Rownd and Gray to the second and third paragraphs of the answer of the State of Indiana to the cross-complaint of said Rownd and Gray. Rownd and Gray each filed a separate cross-complaint, upon notes executed by said Patton to them, and the chattel mortgage executed to secure said notes, on certain property upon which the execution, issued on the judgment in favor of the State, had been levied. It was alleged that said chattel mortgage was a first lien on the property described therein and asked for an order that the proceeds of such property be first applied by the receiver to the payment of the claims of said appellants. The State of Indiana filed an answer in four paragraphs to said cross-complaints of Rownd and Gray. Appellants Rownd and Gray filed a demurrer to the second and third paragraphs of said answer in the following form: "The defendants, Robert M. Rownd and David S. Gray, demur to the second and third paragraphs of the answer to the cross-complaint of said defendants Rownd and Gray, and for cause of demurrer say neither of said paragraphs of answer state facts sufficient to constitute a good defense to either of said cross-complaints." This demurrer was joint and not several. *Cooper v. Hayes*, 96 Ind. 386, and cases cited; *Stone, Adm., v. State, ex rel.*, 75 Ind. 235, 236; *Silvers v. Junction R. Co.*, 48 Ind. 435; *Stanford v. Davis*, 54 Ind. 45.

It follows that if either said second or third paragraph of said answer was good, the demurrer was properly overruled. The second paragraph of answer was a plea of payment, and said appellants do not claim that said paragraph was not good, but assail the third paragraph of answer only. As said second paragraph of answer was sufficient, the court did not err in overruling the demurrer, even if the third paragraph was not good. *City of Plymouth v. Milner*, 117 Ind. 324, 325; *Durham v. Hiatt*, 127 Ind. 514-519.

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It is contended by appellants Rownd and Gray that the finding of the court was not sustained by the evidence. It is insisted in their brief that the controlling question is whether the evidence shows that "Rownd and Gray participated with Patton in any fraud by which the State of Indiana suffered, or by which they intended that the State of Indiana should suffer."

It is true, as insisted by said appellants, that in this State, an insolvent debtor may in good faith prefer one *bona fide* creditor to the exclusion of others, and a mortgage or other security given in good faith to secure a *bona fide* indebtedness, and accepted in good faith for that purpose, cannot be set aside by the other creditors on the ground that the giving and accepting of such security may result in defeating their claims. *Levering v. Bimel*, 146 Ind. 545; *Straight v. Roberts*, 126 Ind. 383; *Gilbert v. McCorkle*, 110 Ind. 215. But if Patton executed the chattel mortgage in controversy to appellants Rownd and Gray with the fraudulent intent to cheat, hinder, delay, or defraud his creditors, and they were injured thereby, and said appellants participated in such fraud, it is clear that such mortgage may, in an action brought by one or more of the creditors, be set aside. It is not necessary, however, to establish the charge of fraud by direct and positive proof. As a general rule men do not perpetrate fraud openly, but the attempt is made to carry out the fraudulent purpose in such a way as to conceal the real intent and purpose and give it the appearance of fairness and honesty, and thus baffle detection. Fraud is therefore usually established by circumstantial evidence. Conduct which standing alone would seem innocent and harmless when considered in connection with other facts and circumstances may furnish sufficient grounds to sustain an inference of fraud. It is "usually shown by the outlook," the circumstances and environments of the transaction, and the situation and relations of the parties, and must be tested by our

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knowledge of human nature, and the motives and purposes which move men in the ordinary transactions and affairs of life." Wait on Fraud. Conv. (3rd ed.), pp. 15, 16.

As was said in Bump on Fraud. Conv. (4th ed.), p. 592, "The frequency of frauds upon creditors, the difficulty of detection, the powerful motives which tempt an insolvent man to commit it, and the plausible casuistry with which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach, are considerations which prevent its classification among the grossly improbable violations of moral duty, and often permit it to be presumed from facts, which may seem slight. How much evidence is required to raise a presumption of actual fraud cannot be determined according to any inflexible rule."

Whether said Patton executed the chattel mortgage to said appellants with the fraudulent intent charged, and whether said appellants participated therein, were questions of fact to be determined by the trial court. *Kelly v. Lenihan*, 56 Ind. 448, 450, 451; *Rhodes v. Green*, 36 Ind. 7. This court said in *Rhodes v. Green*, *supra*, "Since fraud is a question of fact, and not of law, it is the peculiar province of the jury to decide upon the facts, the credibility of the witnesses, and the weight and effect of the evidence. Fraud may be found from circumstances as well as from positive evidence." What was said in regard to the province of the jury in said case applies with equal force to the court in this case as the trier of the facts. If there was competent evidence, either direct, circumstantial, or both, which sustains the finding, this court cannot disturb the same on the weight of the evidence.

After a careful examination of the evidence, we cannot say that the finding of the court was not sustained thereby. As there was competent evidence which satisfied the trial court, we cannot disturb the finding. Judgment affirmed.



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## ON PETITION FOR REHEARING.

**PER CURIAM.**—Appellant Gray alone has filed a petition for a rehearing. The only question discussed in the brief on petition for rehearing is that the evidence does not sustain the finding of the trial court against Rownd and Gray. It is insisted that appellant Gray, under the evidence, does not “stand in precisely the same condition as Rownd.” Rownd and Gray were secured by the same chattel mortgage, executed to them jointly, and the notes secured thereby were payable to them jointly. It is true that Mr. Gray had no knowledge of the execution of the notes and chattel mortgage until after the mortgage was recorded; but, in the acceptance of said mortgage and notes Rownd acted for both and was the agent of Gray, and notice and participation in the fraudulent purpose by Rownd was notice and participation by Gray. When Gray accepted the benefits of the mortgage, the result of the meeting and arrangement with Patton, he accepted it charged with all the infirmities affecting it in the hands of Rownd. The fact that the notes secured by the mortgage were executed to Rownd and Gray on account of their liability as the sureties for Patton, which they might not be compelled to pay, or that, if Gray paid the indebtedness for which they were sureties, that he alone could maintain an action against Patton, does not change the rule. If the mortgage secured notes payable to Gray alone, the rule would be the same, because, whenever any person accepts the benefits of a contract made by another as his agent, he is charged with every infirmity that would affect the contract against the agent if the agent had been acting and contracting for himself and in his own name.

It is also insisted that there can be no possible ground for holding that the evidence discloses any fraudulent purpose and conduct on the part of appellant Gray that in any way distinguishes his security from that of the Muncie National Bank, which the trial court held good. The mort-

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gage executed to the Muncie National Bank is not called in question by any assignment of error in this court, nor is that question before us for decision. It is not proper, therefore, for us to determine whether or not the trial court erred in finding in favor of said bank. The admission by appellant that the finding in favor of the bank was correct does not authorize or require this court to adjudge that therefore the finding against said appellant was erroneous.

Other matters are set up in the petition for a rehearing, but they are not discussed in the brief. It may be suggested, however, that a rehearing will not be granted in order that either an appellant or appellee may file additional briefs, or to enable any party to ask for an oral argument. Requests for time to file additional briefs, or for an oral argument must be seasonably made, and if so made, the court will grant or refuse such requests, as the facts in each case may seem to require. The fact that the clerk of this court may have expressed an opinion as to when a case would or would not be decided, or that the parties were negotiating as to a compromise of the cause, is no excuse for a failure to make such applications before the decision of the cause.

After a careful review of the evidence, we are satisfied that the rule that this court cannot reverse a cause upon the weight of the evidence is clearly applicable to this case.

The petition is therefore overruled.

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BALDWIN v. BOYCE.

[No. 18,658. Filed Oct. 6, 1898. Rehearing denied Dec. 30, 1898.]

**CHATTEL MORTGAGE.—Description of Property.—Location.—Enforcement Against Purchaser of Mortgaged Chattels.**—The description of property in a chattel mortgage, as located at a certain street and number, omitting the name of the city and county, is sufficiently definite to authorize the enforcement of the lien against the property in the hands of a purchaser thereof, where the mortgage disclosed that the mortgagor was a resident of a certain county; that the mortgage note was made payable at a bank in the county seat

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of such county; the mortgage acknowledged and recorded in such county; that the mortgaged property was in the possession of the mortgagor and that she was to retain the possession of the mortgaged property until the maturity of the note secured. pp. 47-53.

**SAME.**—*Description.—Identification of Property.—Parol Evidence.*—Parol evidence is admissible for the purpose of aiding the description in the mortgage in the identification of the mortgaged property. p. 51.

**SAME.**—*Foreclosure.—Complaint.—Record of Mortgage.*—An allegation in a complaint to foreclose a chattel mortgage that the mortgage was recorded in a certain county within ten days after its execution, and a copy of the mortgage, made a part of the complaint by exhibit, disclosing that the mortgagor resided in such county at the time she executed the mortgage, sufficiently show that the mortgage was recorded in the county in which the mortgagor resided. pp. 53-54.

**SAME.**—*Foreclosure.—Complaint.—Maturity of Debt.*—The omission in a complaint to foreclose a chattel mortgage of an averment as to the maturity of the debt is supplied by a copy of the mortgage filed therewith showing that the note secured had fully matured before the action was instituted, and such infirmity in the pleading is thereby cured. p. 54.

**SAME.**—*Foreclosure.—Complaint.—Allegation as to Payment.*—An averment in a complaint to foreclose a chattel mortgage upon property in the hands of a purchaser thereof, that plaintiff holds a lien on the mortgaged chattels by virtue of her mortgage, and that the interest in the property held by the defendant is inferior and junior to her said lien, inferentially shows that the mortgage debt was unpaid at the time of the commencement of the action, and is sufficient to put defendant upon his answer. pp. 54, 55.

From the Delaware Circuit Court. *Reversed.*

*Wagner, Bingham & Long*, for appellant.

*Chauncey L. Medsker*, for appellee.

**JORDAN, J.**—This action was originally commenced by appellant against the appellee and Sarah Herman to recover a judgment against the latter upon a promissory note and to foreclose a chattel mortgage, securing the payment of said note against appellee, Boyce.

The cause of the action was subsequently dismissed as to the defendant, Herman, and the court, having sustained a separate demurrer of appellee to the complaint for insuffi-

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ciency of facts, judgment was rendered upon demurrer against appellant, and the ruling of the court in sustaining this demurrer is the only error assigned.

The complaint, among other things, alleges the execution of the note by the defendant Herman, to plaintiff, on February 20, 1896, for the sum of \$300, and to secure the payment of this note, with the interest thereon when due, it is averred that the said defendant Herman, on March 27, 1896, executed to plaintiff a chattel mortgage on her stock of furniture and restaurant fixtures then situated in the restaurant and hotel rooms, being located at No. 313 East Main street, in the city of Muncie, Delaware county, Indiana. It is further alleged that this mortgage was duly recorded in the recorder's office of Delaware county, Indiana, within ten days after its execution. It is also averred that on the — day of ———, 1896, the defendant, Boyce, purchased from said Herman the said property.

At the time of the execution of the chattel mortgage in question, and for many years prior thereto, and ever since said time, it is averred that the defendant Boyce, "Was, has been, and is now the owner of said restaurant and hotel room and the building in which the same are situated;" that at the time the mortgage was executed by Sarah Herman, the latter was the tenant of Boyce, and occupied these rooms at No. 313 East Main street in the said city of Muncie; that these rooms, at the time of the purchase of the property by Boyce, were well known to him, and he also, at that time, knew that said property consisted of hotel and restaurant furniture and fixtures, and was situated in the said rooms and building, and he also knew, it is averred, that said rooms were numbered 313 East Main street, in the said city of Muncie, and that they had been so numbered long prior thereto.

It is further alleged, in the complaint, that in drafting the mortgage in suit, the name of the city and county in which the chattels were situated was inadvertently and

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unintentionally omitted. A copy of the mortgage is filed with the complaint and made a part thereof, and what also purports to be a copy of the note, secured by the mortgage, is filed as an exhibit with the complaint.

The prayer of the plaintiff, as far as it applies to appellant, is for a foreclosure of the chattel mortgage and the sale of the mortgaged property in payment and satisfaction of the mortgage debt. The mortgage, among other things, as the copy thereof discloses, recites that Sarah Herman, of Delaware county, in the State of Indiana, mortgages to Mary Baldwin, etc., the following described personal property, to wit: "All and singular the restaurant and hotel furniture and fixtures, located in and situated in and about the 1st, 2nd and 3rd stories of No. 313, East Main street, consisting of the following articles, to wit: 1 large folding lunch counter; 1 large wall case; set shelving; 1 ten gallon coffee urn; 1 glass top cigar case; 1 wall mirror; 1 bank mirror; 6 folding tables; 10 side tables; 6 tray stands; 10 lunch counter chairs; 50 dining chairs; 1 sideboard; 80 yards linoleum; 1 small refrigerator; 1 large refrigerator; 1 linen and dish safe; 1 ten-hole range; 1 steam table; 1 charcoal broiler and utensils; 1 thirty gallon hot water boiler; 1 gas stove; 24 bedsteads with the bedding for the same; 21 wash-stands with bowls and pitchers; carpeting in 22 rooms and hall carpeting; 7 heating stoves for upstairs rooms; 24 mirrors; 9 dressers; 50 chairs; 1 piano. To secure the payment of a certain promissory note, dated at Muncie, Indiana, February 20, 1896, for the sum of \$300 and due in sixty days from date and payable at the Merchants' National Bank of Muncie, Indiana, with eight per cent. interest per annum, executed by the said Sarah Herman to the said Mary Baldwin."

The mortgage also discloses that the mortgagor was in possession of the mortgaged property at the time of its execution, and that under its terms she was to retain the possession and use of the property until the note secured thereby

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became due. It appears from the exhibit that the mortgage was duly acknowledged and filed for record on the same day that it was executed, and that it was recorded in the chattel mortgage record. 8, in the recorder's office of Delaware county.

We are informed, by the brief of appellant's counsel, that the lower court held, upon the demurrer of appellee, the description of the mortgaged property insufficient. The contention of appellant's counsel is that the description of the mortgaged chattels is sufficient and that the complaint, when aided by the facts which a copy of the mortgage discloses, is substantially sufficient to withstand the demurrer of appellee.

The principal question discussed, *pro* and *con*, by counsel for the respective parties relates to the sufficiency of the description of the property, as described in the mortgage. It is insisted by appellee that the description of the chattels covered by the mortgage is not sufficiently definite or certain as to authorize the enforcement of the lien against the property in the hands of appellee, whom, it is said, is a purchaser thereof in good faith.

Appellee virtually concedes that, if the instrument contained anything by which the property might be identified, then, in that event, it might be held sufficient. The insistence is that the instrument states but one thing that would, if certain, afford means of identification, and that is, that the mortgaged goods are situated at "No. 313 East Main street," but as to where "East Main street" is located, it is asserted, is left wholly indefinite by the mortgage.

The rule is well settled in this jurisdiction, as well as elsewhere, that the description in a chattel mortgage must be reasonably certain, and a description of the property which will enable third persons, aided by the inquiries which the instrument itself indicates, or suggests, to identify the mortgaged property, is sufficient. The rule asserted by the ancient maxim of the law, "*certum est quod certum reddi po-*

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test," that is certain which can be rendered certain, is applicable to the description in a chattel mortgage. The law properly permits parol evidence to be employed, not to furnish the description but to aid, if possible, the description given in the mortgage, in the identification of the mortgaged property. In support of the doctrine above asserted, see *Burns v. Harris*, 66 Ind. 536; *Tindall, Adm., v. Wasson*, 74 Ind. 495; *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Muncie Nat. Bank v. Brown*, 112 Ind. 474; *Buck v. Young*, 1 Ind. App. 558; *Koehring v. Aultman, etc., Co.*, 7 Ind. App. 475; 5 Am. & Eng. Ency. of Law (2nd ed.) 956.

Cobbey on Chattel Mortgages, section 188, states the rule as follows: "The general rule seems to be that, as between the parties, any description is good, if the parties at the time knew and understood what the mortgage covered. That as to third parties, where the property intended to be mortgaged was identified at the time, any description which points out the particular property, or suggests inquiries by which it can be identified outside of the instrument, is good against the world. If part or all of the description is erroneous, it is only to be rejected, as invalidating the mortgage, when it is so misleading as not even to suggest the property intended to be mortgaged; and if part of the property can still be identified, it is good as to that part."

Applying the principles, to which we have referred, to the mortgage in the case at bar and testing it thereby, we are of the opinion that the description therein must be held sufficient. The description of the property is mainly assailed by the appellee upon the ground that the location thereof is rendered uncertain or indefinite, for the reason that the instrument omits the name of the place where the designated street is situated. As a general rule it is true that the location of the mortgaged chattels ought to be given in the mortgage, still, as location serves only as an element or

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feature of identification, its omission is not necessarily fatal, if the property is otherwise sufficiently described.

We cannot concur, however, in the contention of counsel for the appellee that the omission in the mortgage of the particular town or city, wherein the designated street is situated, renders the description of the property, as otherwise furnished by the instrument, insufficient. The claim of the appellee, that the failure to give the name of the town or city, in which "East Main street" may be found, leaves the instrument without any other circumstances or means to identify the property, is not supported by the facts. The mortgage, as heretofore said, states that the chattels mortgaged consisted of restaurant and hotel furniture and fixtures, located in and about the first, second, and third stories at No. 313 East Main street. It further discloses that the mortgagor was of Delaware county, Indiana, and that the property was in her possession, and that she was to retain the possession and use of the same until the maturity of the note secured. It was further recited therein that the note secured thereby was executed by the mortgagor to the mortgagee at Muncie, Indiana, and was made payable at a designated bank in that city. It was further shown by the instrument that it was acknowledged before a notary of Delaware county, Indiana, of which, as it is well known, the city of Muncie is the county seat; and an examination of the public records would have shown that it was recorded in the recorder's office of that county.

It must be evident that all of these circumstances and means, which the instrument itself discloses and which, at least, may be said to be suggestive of the place where the property, at the time of the execution of the mortgage, was located, were sufficient to have put an ordinarily prudent person upon inquiry relative to the particular *situs* of the chattels mentioned and embraced in the mortgage. It is manifest also, we think, that, aided by such inquiry, the situation of such chattels could have been easily ascertained.



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Certainly, a proper inquiry, under the facts, would have developed that the street mentioned in the instrument was in the city of Muncie, Delaware county, Indiana.

The rule is elementary that, where a person has knowledge of facts sufficient to put him upon inquiry, he is chargeable with the knowledge of all matters which he could have learned by reasonable inquiry. Viewed in any light presented by the facts and circumstances of the case, it must be evident that the description of the property in question was sufficient to have identified it upon reasonable inquiry. The mortgage was duly recorded and was notice to all, and the appellee is bound by it, regardless of the fact that he may not have had actual knowledge of its existence at the time he purchased the property. *Ross v. Menefee*, 125 Ind. 432; *Koehring v. Aultman, etc., Co.*, 7 Ind. App. 475.

When the other facts alleged in the complaint, relative to the mortgagor being a tenant of the appellee and occupying the building at 313 East Main street, in the city of Muncie, which, it is averred, was owned by appellee, and wherein, it seems, the property in controversy was situated at the time of the execution of the mortgage, are considered in connection with the facts which the mortgage itself reveals, it is clear, we think, that a very little investigation or inquiry upon his part, would have led to the discovery that the goods, which he was about to purchase, were the identical property encumbered by the mortgage.

It is insisted, by counsel for the appellee, that the complaint is also insufficient for the following reasons: First, it does not show that the mortgage was recorded in the county in which the mortgagor resided. Second, that it does not expressly allege that the debt secured by the mortgage lien is due and unpaid.

In answer to the first objection, it may be said that the pleading expressly avers that the mortgage was duly recorded within ten days after its execution in the recorder's office of Delaware county, Indiana, and a copy thereof, which is a

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proper exhibit and made a part of the complaint as such, discloses that the mortgagor resided in that county at the time she executed the mortgage. This was sufficient. *Brown v. Corbin*, 121 Ind. 455.

Relative to the second objection, it may be said that it is true that the law requires that the cause of action must have accrued before it is commenced, and that a pleading founded on a contract is not complete unless it alleges a breach of such contract. This rule is well recognized and affirmed. *Lawson v. Sherra*, 21 Ind. 363; *Brickey v. Irwin*, 122 Ind. 51.

It is true in this case that the complaint does not, as it should, expressly allege that the mortgage debt is due and unpaid. The record, however, shows that the complaint was filed on the 25th day of May, 1896, and it is shown, by the copy of the mortgage filed therewith, that the note secured had fully matured before the action was instituted, therefore, the omission of the complaint to allege the maturity of the debt, is supplied by the facts which the exhibit discloses, and the infirmity of the pleading in this respect is thereby cured. *Green v. Louthain*, 49 Ind. 139; *Hardin v. Helton*, 50 Ind. 319; *West v. Hayes*, 104 Ind. 251; *Taylor v. Hearn*, 131 Ind. 537.

The complaint was also required to allege facts which would either expressly or inferentially disclose the nonpayment of the mortgage debt. *Wheeler, etc., Mfg. Co. v. Worral*, 80 Ind. 297; *Stanton v. Kenrick*, 135 Ind. 382, and cases there cited.

The pleading itself, however, substantially alleges that the plaintiff holds a claim or lien on the mortgaged chattels, by reason and virtue of her said mortgage, and that the interest in the property, held by the defendant, Boyce, is inferior and junior to her said lien. These averments fairly show that the plaintiff, at the time she commenced this action, still held a lien upon the property, by reason and virtue of the mortgage in suit, and that this lien was superior to the inter-

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est which the defendant held in said property. Such facts may be said at least inferentially to show that the debt, which such lien secured, was unpaid; for it is evident, if the plaintiff's lien on the property, under the mortgage, still existed at the time the action was instituted, that the debt had not been satisfied by payment or otherwise.

Considering, then, the facts alleged in the complaint, in connection with those which the exhibit supplies, it may be said, at least, that it is inferentially disclosed that the mortgage debt was due and unpaid at the commencement of the action, and the pleading, in this respect, is sufficient to put appellant upon his answer.

While we are constrained, under the liberal rules of pleading, as settled by the decisions of this court, to uphold the sufficiency of this complaint, we may, however, with propriety say that it is loosely drafted, and we cannot commend it as a model pleading. The judgment is reversed, and the cause remanded to the lower court for further proceedings.

FRAIN ET AL. v. BURGETT ET AL.

[No. 18,843. Filed May 24, 1898. Rehearing denied Dec. 30, 1898.]

**HUSBAND AND WIFE.—Purchase-Money Mortgage Executed by Husband Alone.—Foreclosure.—Inchoate Interest of Wife.**—A purchaser of real estate at a foreclosure sale under a mortgage executed by the husband alone takes under such sale nothing more than the interest or title of the husband, which does not embrace the inchoate interest of the wife; and if the mortgage be for purchase money it is then held by the purchaser subject to the right of the wife to redeem in the manner and under the conditions provided by law. pp. 59, 60.

**DEEDS.—After-Acquired Title.—Husband and Wife.—Mortgages.—Foreclosure.—Inchoate Interest of Wife.—Redemption.**—A grantor conveyed land giving only a certificate of purchase. The land was afterward conveyed by successive warranty deeds. The last grantee mortgaged same for the purchase money, his wife not joining therein, and the mortgage was foreclosed without making the wife a party. After the foreclosure, and pending the sale, the original grantor executed a warranty deed to the last grantor. Held, that

152	55
160	10
152	55
166	420
168	515

152	55
166	324
170	229
170	281
170	313

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such deed related back and vested the after-acquired title in grantee as of the date of his deed; that the inchoate interest of grantee's wife also attached as of that date; that the purchaser at the foreclosure sale acquired the legal title to the land, subject to the right of the wife to redeem as to her one-third interest in the manner provided by law. pp. 60-65.

**PLEADING.**—*Demurrer.*—*Motion to Make More Specific.*—The fact that a pleading is not as certain and specific as the rules of good pleading require will not, as a general rule, render it bad on demurrer. Objection to a pleading on the ground that it is uncertain must be interposed by motion to make more specific. p. 61.

**SAME.**—*Specific Facts Control.*—The sufficiency of a pleading depends upon the specific facts alleged, and not upon the mere conclusions of the pleader. p. 62.

**HUSBAND AND WIFE.**—*Inchoate Interest of Wife in Lands of Husband.*—A wife cannot be said to take the interest given her by section 2491 R. S. 1881, through her husband, but such interest attaches as an incident to his seizin during coverture, and cannot be divested through any charge or conveyance made by him, unless she joins therein. p. 66.

**ESTOPPEL.**—*Pleading.*—Matters creating an estoppel must be specially pleaded. p. 69.

From the White Circuit Court. *Reversed.*

*A. W. Reynolds, A. K. Sills, Stewart T. McConnell*  
and *Albert G. Jenkins*, for appellants.

*S. P. Baird, E. B. Sellers* and *W. E. Uhl*, for appellees.

**JORDAN, J.**—Appellants originally instituted this action by a complaint in six paragraphs, whereby they sought to redeem certain described lands from a mortgage executed to secure the purchase money thereof. A demurrer was sustained to the sixth paragraph of the complaint, and thereafter the plaintiffs dismissed all of the remaining paragraphs, and refused to plead further, and elected to stand by their sixth paragraph, and judgment was rendered in favor of the defendants, from which this appeal is prosecuted.

The action of the court in sustaining the demurrer to the paragraph in question is the only error of which appellants complain. The following are substantially the facts averred in the paragraph in dispute:

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In July, 1852, the board of trustees of the Wabash & Erie Canal were the owners in fee simple of the lands described in the complaint, consisting of 320 acres, situated in White county, Indiana. On the 5th day of July, 1852, Austin M. Puett purchased this land from the said board of trustees and received a certificate of purchase for the same and entered into possession of the land, and thereafter paid the taxes thereon. In 1856, Puett, for a valuable consideration, sold the lands to Ashabel P. Willard and James G. Gwin, and assigned and delivered to them his certificate of purchase, and they went into possession of said real estate under said sale and transfer. On February 13, 1856, Willard, for a valuable consideration, sold and conveyed the real estate in question by general warranty deed to Gwyn, and put the latter in full possession thereof under said warranty deed. Gwin immediately made lasting and valuable improvements upon the land, and on the 1st day of April, 1856, he, it is averred, being still the owner in fee simple, and in possession of the real estate, sold and conveyed it by a warranty deed, in fee simple, for a valuable consideration, to one George Frain, and put said Frain in full possession thereof, and the said grantee made lasting and valuable improvements thereon. Said board of trustees did not execute a deed for said real estate until December 3, 1857, when, upon the payment of the purchase money for said land, said board, by deed, conveyed the legal title of said real estate to Gwin. The plaintiff Catharine Frain is the widow of George Frain, who died at White county in 1894. Prior to April 1, 1856, she became the wife of said Frain, and continued as such until his death. On October 3, 1857, one Miller recovered a judgment against the said George Frain in the White Circuit Court for \$716.75, together with a foreclosure of the mortgage upon the said real estate. This mortgage was a purchase-money mortgage, and Mrs. Frain, the appellant, did not join her husband in the execution thereof, and was not made a party to the suit of foreclosure, and had no knowledge or

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notice of this suit until shortly before this action was commenced. On December 14, 1857, the real estate was sold by the sheriff under said decree of foreclosure to one Hays for \$10, who, upon payment of his bid, received from the sheriff a deed for said land. It is averred in the complaint that the said George Frain was seized in fee simple of the said real estate while he and Catharine Frain were husband and wife, and that his said wife at no time joined her husband in the conveyance of said real estate. Through mesne conveyances from Hays and wife, appellees acquired all the right, title, and interest of Hays and his wife under said sheriff's deed in and to the real estate, and their respective interests are set forth in the complaint, and the value of the rents and profits is alleged. Since the death of George Frain, his widow has conveyed, as alleged, in fee simple, to her co-appellants herein, for a valuable consideration, the undivided one-sixth of said real estate, and that appellants, as it is alleged, now hold and own the same.

It is contended by counsel for appellants that these facts, considered as a whole, show that George Frain was seized in fee simple of the lands in controversy during his marriage with the appellant, Catharine Frain, and as it further appears that she never joined her husband in any manner in the conveyance of the real estate in dispute, therefore, at his death she became absolutely seized of the one-third interest which the statute awards her, subject to the purchase-money mortgage mentioned, and that by reason of these facts, and the further fact that she was not a party to the action of foreclosure, she is entitled to redeem. Appellees, however, insist that, from the facts, it is disclosed that appellant's husband was never seized, at any time during the coverture, with any other than the equitable title or estate in the land, and of this title, they claim, he is shown to have been divested before his death; hence appellant, Catharine Frain, as surviving wife, has no interest in the land.

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Section 27 of the statute of descents in this State, being section 2491 R. S. 1881, section 2652 Burns 1894, provides as follows: "A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death." Section 2499 R. S. 1881, section 2660 Burns 1894, provides: "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands, \* \* or preclude her from the recovery thereof, if otherwise entitled thereto."

This interest of the wife attaches as an incident to the seizin of the husband during the marriage, and no act or conveyance by the husband, nor charge in respect to the land, without the wife joining him therein, can serve to divest or extinguish her interest. *Grissom v. Moore*, 106 Ind. 296. As the husband can do nothing, by reason of this statute, that can affect the inchoate interest of the wife when it has once attached to the land, it is evident that if the real estate is sold and conveyed, either directly by himself or through the medium of an officer of the court, as in the case at bar, in satisfaction of a mortgage executed by the husband, the wife not joining, the purchaser takes under such sale nothing more than the interest or title of the husband, which does not embrace the inchoate interest of the wife. Hence it is taken and held by such purchaser subject to the interest of the wife, and if the mortgage be for purchase money, it is then held subject to her right to redeem in the manner and under

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the conditions provided by law. This court has held, and properly so, that, under our statutes the interest of the wife in the husband's real estate is not an encumbrance, but is an estate in the land. It is more than the right of dower as it formerly existed, for there is no reversionary interest in the party who claims through the husband. *Beaver v. North*, 107 Ind. 544.

The principal question with which we have to deal in this case is: Can George Frain, the husband, under the facts, be said to have been seized in fee simple of the real estate at any time during his marriage? If so, then by reason of this fact, taken in connection with the other facts alleged in the complaint, appellant would be entitled to the right of redemption which she seeks in this action. *Barr v. Vanalstine*, 120 Ind. 590; *Brenner v. Quick*, 88 Ind. 546. An estate in fee simple is the highest known to the law, and is defined to be one of absolute inheritance, free from any conditions, limitations, or restrictions as to particular heirs. *Anderson's Law Dict.*, p. 451; 1 *Bouvier's Law Dict.*, p. 649. It is true that seizin of the husband in fee simple in the land during the marriage is an essential prerequisite to the attaching of the wife's interest. However, in order that her interest may attach, the law does not require nor contemplate that an absolute seizin on the part of the husband during the coverture in all cases must exist. In *Tiedeman on Real Prop.*, section 121, the author says: "In order that dower can attach, the husband must be seized of an estate of inheritance during coverture. But for this purpose it is not necessary that the husband should have the actual corporeal seizin. Seizin in law, with the present right to actual seizin would be sufficient." See, also, *Mann v. Edson*, 39 Me. 25; *Atwood v. Atwood*, 22 Pick. 283; *Dunham v. Osborne*, 1 Paige, 634; *Thomas v. Thomas*, 10 Ired. 123; *McIntire v. Costello*, 47 Hun 289; *Stroup v. Stroup*, 140 Ind. 179.

Accepting the facts as they are averred in the complaint, they disclose that the board of trustees of the Wabash &



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Erie Canal was in July, 1852, the owner, in fee simple, of the land involved in this action. On the 5th of that month the board sold the land to Puett and issued to him a certificate of purchase. Puett seems to have entered into possession of the land, paid the taxes thereon,—all of which may be said to have been the exercise by him of acts of ownership. Some time prior to the 13th day of February, 1856, Puett sold the real estate to Willard and Gwin, and assigned in writing and delivered to them his certificate of purchase. On February 13, 1856, Willard sold and conveyed the real estate in fee simple, as it is alleged, to Gwin, and the said vendee immediately thereafter went into possession and made valuable and lasting improvements thereon. On April 1, 1856, it is alleged that Gwin, being the owner in fee simple of the land, conveyed it by a general warranty deed, for a valuable consideration, to George Frain, and that the latter entered into possession thereof and made valuable and lasting improvements. On the 3rd day of December, 1857, after the foreclosure proceedings and before the sale thereunder, the board of trustees of the Wabash & Erie Canal, by deed, conveyed the legal title to the real estate to Gwin. It is true, as appellees urge, that the complaint does not disclose when the mortgage was executed, but it does appear from its averments that the mortgage was for purchase money, and that the wife, Catharine Frain, did not join her said husband in its execution. While the complaint may be said to be open to the objections that it is not as certain and specific in some respects as the rules of good pleading require, still, this will not, as a general rule, of itself render it bad on demurrer. *City of Connersville v. Connersville, etc., Co.*, 86 Ind. 235, and cases there cited.

Ordinarily, objections to a pleading upon the ground that it is uncertain must be interposed by a motion to make more specific. *Peden v. Mail*, 118 Ind. 556. But we think it may be said to be disclosed that George Frain executed the mortgage, for it is averred that the wife did not join her husband

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in the execution of this instrument. The allegations that the land was conveyed to Frain in fee simple during the marriage, and of his subsequent death, appear at least to make a *prima facie* case as to her interest in favor of the surviving wife. But it is insisted by the appellees that the specific averments in a pleading must control the general averments. In this contention counsel for appellees are right. Whether a pleading is or is not sufficient depends upon the substantive facts and not upon the mere conclusions of the pleader. General statements of facts as a rule are controlled by specific facts disclosed in the pleading. *Ragsdale v. Mitchell*, 97 Ind. 458; *State, ex rel., v. Casteel*, 110 Ind. 174; *McPheeters v. Wright*, 110 Ind. 519.

Appellees claim that at the time Frain executed the mortgage, and at the time of the foreclosure thereof, he is shown by the specific facts to have held but an equitable title to the land, which, as they contend, he could mortgage or convey without the consent of his wife. They insist that it appears from the specific averments of the complaint that, at the time (April 1, 1856) when Gwin is alleged to have conveyed by warranty deed to Frain the former was not invested with the legal title; that said title still remained in the board of canal trustees, and was not conveyed to Gwin by that board until December 3, 1857; and counsel for appellees contend, adversely, however, to the contention of appellants' counsel, that this after-acquired title by Gwin did not inure to the benefit of Frain by relation back to the time when Gwin, under his deed of general warranty, as stated, conveyed to Frain. They insist that the fact that the board of trustees conveyed the legal title to Gwin on December 3, 1857, after the decree of foreclosure was rendered, but before the sale thereunder, can in no manner be available to aid or support appellants' cause of action. Appellees say: "When Gwin acquired the legal title, Frain's equitable title had, by relation, passed to the purchaser under the decree of foreclosure as of the date of the mortgage, and necessarily Gwin held the

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naked title in trust, not for Frain, but for the holder of the equitable title, the purchaser at the foreclosure sale." But if it can be said, under the facts, that Gwin was not invested on April 1, 1856, when he executed his deed of conveyance to Frain, with the legal title to the land, and did not acquire such title until December 3, 1857, still these facts will not serve to defeat the interest of appellant which she claims as the surviving wife. If Gwin, when he executed his deed to Frain, was not invested with the legal title, but subsequently acquired it by a deed from the board of trustees, then the effect and operation, in contemplation of law, of the covenants of warranty in his deed to Frain, would, by relating back, actually transfer to and vest the after-acquired title in Frain, as though it had passed to him by Gwin's deed in the first instance, and Frain could be said, in the eye of the law, to have been seized in fee simple of the real estate on and from April 1, 1856, the date of the execution of the deed by Gwin to him, and the interest of his wife attached as of that date, subject to the mortgage for purchase money. That such would be the result, we think, is settled by a large majority of the authorities. The law will not only treat the after-acquired title as being in the former grantor in trust for his grantee, and hold him estopped from asserting it as against the latter, or others claiming through him, but it will consider and treat it as though it had actually passed at the time of the conveyance under the warranty deed. 19 Am. & Eng. Ency. of Law, pp. 1021, 1022, and the many cases cited in foot-note 1 on p. 1022. In 2 Devlin on Deeds (2nd ed.), section 946, the author says: "Where covenants for title are contained in the deed, the after-acquired title will pass with the same effect as if it had originally been conveyed to the grantee and his successors." Citing many cases in support of the text in foot-note 4. Washburn, in his work on Real Property, Vol. 3, 119, states the rule as follows: "The title acquired by the grantor who has conveyed by warranty inures *eo instanti* that he gains the

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title to his grantee and vests in him." Rawle asserts the same doctrine, as follows: "As a general rule, any after-acquired title will inure by virtue of the warranty to the party claiming under such warranty with the same effect as if it had originally passed." Rawle Covenants of Title (3rd ed.), p. 412, *et seq.* Maupin, in his work on marketable titles to real estate, section 213, says: "It seems to be established in America that the effect of an estoppel arising from the covenants or recitals by the grantor in his deed, is to actually transfer the after-acquired estate to the grantee, so as to obviate the necessity of a second conveyance of the premises." The following authorities also support or affirm this doctrine: 2 Herman on Estop., section 229 *et seq.*; *Fisher v. Hallock*, 50 Mich. 463; *Woods v. Bonner*, 89 Tenn. 411; *Philly v. Sanders*, 11 Ohio St. 490. In fact, the same rule is recognized by the decisions of this court. See *Booker v. Tartwater*, 138 Ind. 385, on p. 391, and cases cited; *Randall v. Lowler*, 98 Ind. 255.

It must follow, under the facts, and we so hold, that Frain became seized in fee in the lands at the time of the conveyance of Gwin to him, and that being during the coverture, the wife's inchoate interest immediately attached upon the seizin of her husband. Both parties in this action claim through Frain. Hence the after-acquired legal title, passing, as it did, by relation back to the date of the execution of Gwin's deed,—which we must presume, under the facts, was executed prior to the execution of the mortgage through which appellees claim title,—it also inured to their benefit, as, under the foreclosure sale, the legal title of the husband to the lands, subject to his wife's rights, passed to the purchaser at such sale, and therefore such title inures to the benefit of the appellees. Appellees, then, under the circumstances,—holding as it may be said they do, the interest to which they are entitled in the lands, in fee simple, by virtue of the sale and conveyance under the mortgage to their remote grantor,—certainly cannot be heard to assert that

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Frain, the common source through whom both parties claim title, was not seized in fee simple at the time he made the mortgage in question; or, in other words, they cannot, under the circumstances, accept the benefits inuring from the after-acquired title, and at the same time deny that Frain was seized in fee simple at the time he executed the mortgage. The complaint stated a cause of action, and the court erred in sustaining the demurrer thereto. The judgment is therefore reversed, and the cause remanded to the lower court.

ON PETITION FOR REHEARING.

JORDAN, J.—Counsel for appellees, in their brief filed in support of the petition for rehearing, have very elaborately and ably presented their views adverse to the holding in this case at the former hearing, which was to the effect that George Frain, husband of appellant, Catharine Frain, was seized in fee of the real estate in controversy by relation back of the title to him from Gwin, his immediate grantor, when the latter acquired title to the land by conveyance from the canal trustees, and that the inchoate interest given to appellant by the statute attached to the realty by virtue of such seizure on the part of her husband, and, as she was not made a party to the foreclosure of the mortgage in question, her equity of redemption had not been barred. At the earnest solicitation of appellees' learned counsel, we have again given the questions involved a careful consideration in the light of the authorities, and are confirmed that the conclusion reached in the original opinion is correct. At the time Miller, who appears to have been the holder of the mortgage executed by George Frain, instituted the action against him, the latter was invested with the equitable title only, the legal title to the lands at the time being, as we have seen, still in the canal trustees. After the rendition of the judgment in that action, and some eleven days before the purchase of the land by

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Hays at the sheriff's sale under the foreclosure decree, the canal trustees conveyed the land to Gwin. It is manifest, we think, that whatever legal title Hays, the purchaser at the sheriff's sale, obtained to the land, came to him under his said purchase, by virtue of the after-acquired title by Gwin through the conveyance of the canal trustees, which conveyance, as held, in effect served to transfer the real estate in fee to Frain, the mortgagor, through Gwin, by virtue of the latter's conveyance of April 1, 1856. It must also follow, perforce of the authorities cited in the original opinion, that when the legal effect or operation of the conveyance by the trustees to Gwin, under the circumstances in the case, is considered, the result must be the same, so far as appellant's inchoate interest is concerned, as though her husband had been actually invested with the legal title to the land under or by the warranty deed executed by Gwin to him. Counsel for appellees are mistaken in their assertion that appellant acquired her interest in one-third of the land in dispute through her husband. Under section 2491 R. S. 1881, section 2652 Burns 1894, a wife cannot be said to take the interest given her under its provisions through her husband. She takes it, it is true, through the same title that he does, encumbered with and subject to the same liens, infirmities, and liabilities as is his title. Her right or interest in the lands begins with his seizin during coverture, and it attaches as an incident to such seizin, and it cannot be defeated or divested through any charge or conveyance made by him, unless the wife joins therein. *Grissom v. Moore*, 106 Ind. 296. This inchoate right of the wife, under our statutes, is considered not in the nature of an encumbrance, but as an interest or estate in the land itself, and is unlike that of the right of dower, for there is no reversionary interest in the person who claims through the husband. *Bever v. North*, 107 Ind. 544. She acquires this interest, not as an heir, but by virtue of her marital rights. Where a husband is seized in fee of lands at any time during his marriage, and his title is divested by the means of

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any encumbrance or conveyance made by him in which his wife did not join, the latter, at his death, under section 2491, *supra*, is deemed as taking her interest therein as a purchaser for value, for marriage is the highest consideration known to the law. *Richardson v. Schultz*, 98 Ind. 429; *Bookout v. Bookout*, 150 Ind. 63.

It is earnestly insisted by counsel for appellees that at the time the mortgage was foreclosed, George Frain, husband of appellant, was the only person, as they assert, who had any interest in the mortgaged premises, and inasmuch as appellant's interest had not attached at the time of the foreclosure, and as she claims through her husband, her right to redeem is barred by the foreclosure decree, by reason of his being a party thereto. But, as heretofore said, it is not true that appellant must be held to claim her interest in the land through her husband. Neither does she profess so to claim it. Neither is it true that her husband at that time was the only one interested in the mortgaged premises. The legal title thereto at that time, as we have seen, was in the canal trustees, and they were not made a party to the action. The holder of the mortgage apparently instituted and prosecuted his action to foreclose the same upon the theory that George Frain was the only necessary or proper party defendant, and it may be said, under the circumstances, that the mortgage was not actually foreclosed against any one, at that time, who was invested with the legal title to the land. Appellant's husband, at the time of the foreclosure proceedings, for aught appearing to the contrary, under the facts, did have a present right to become actually seized in fee of the land in controversy, and upon such seizin the interest of his wife would thereby attach, and this fact certainly put the wife in a position of having such an interest in the land as would render her a proper party, at least, to the foreclosure suit, in order that she might be bound thereby in the event her husband became actually seized of the land in fee, as he did by vir-

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tue of the after-acquired title under the conveyance of the trustees to Gwin.

Surely it cannot be insisted that if the canal trustees, who were not parties to the foreclosure proceedings, had thereafter conveyed the legal title to either appellant or her husband, instead of to Gwin, as they did, that she would be bound by the decree, and her equity of redemption, or other rights in the land, would thereby be entirely cut off and barred. Again, the statute, as we have seen, also gives the surviving wife her interest in all lands in which the husband had an equitable interest at the time of his death. In the event appellant's husband had died after the foreclosure proceedings, but before his equitable interest in the land had passed from him by the sheriff's sale, certainly, under such circumstances, she would not have been barred of her rights by the decree of the court to which she was not a party; and to this extent also, at least, she was a proper party to the action instituted to foreclose the mortgage against her husband. Simply making the husband a party, under the circumstances in this case, could not affect the wife in any manner; for the husband in no sense can be said to be her representative in reference to her inchoate interest in his lands. Appellant, as we have seen, does not profess to claim her interest and rights, which she is seeking to maintain in this action, through her deceased husband, but she asserts them by virtue of her marital rights under his seizin through the conveyance in question of the canal trustees which, we may again affirm, had the effect and operation, in contemplation of law, of placing her, in respect to her inchoate interest, in the same condition as though her husband had obtained the legal title to the land under the warranty deed executed by Gwin to him on April 1, 1856.

We may, however, dismiss this feature of the case, in relation to the effect of the decree upon appellant's rights in the premises, as she, under her complaint, simply seeks an accounting, in order that it may be ascertained by the court



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what amount is due appellees, and, upon payment thereof, that she may be permitted to redeem one-third of the land in dispute from the mortgage, etc. The effect of our decision at the former hearing was that, under the facts alleged in the complaint, a *prima facie* case in favor of the rights which she asserted was thereby presented. If, for any reason, appellant is estopped by the foreclosure decree or by the rights of innocent parties, etc., as insisted by appellees, and which are said to enter into the case, all such defenses can be interposed by answer, and, if sufficient, may be made available. Under the code, matters creating an estoppel must be specially pleaded. *Center School Township v. State, ex rel.*, 150 Ind. 168, and cases there cited.

The petition is overruled. All concurring, except McCabe, J., dissenting.

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RAINS v. THE STATE.

[No. 18,510. Filed January 3, 1899.]

**CRIMINAL LAW.—Assault and Battery with Intent.—Instructions.—Harmless Error.**—Erroneous instructions as to malice and other elements which enter into the crime of murder in the first and second degrees will be considered harmless, where appellant was convicted only of assault with intent to commit manslaughter. pp. 69, 70.

**SAME.—Instruction.—Revenge.**—On the trial of one charged with assault with intent to commit murder an instruction which deals with the question of self-defense is not vitiated by the addition of the words, "the law does not permit a person to revenge himself in any case." p. 71.

**SAME.—Instruction.—Reasonable Doubt.**—An instruction that the jury is not required to be satisfied beyond a reasonable doubt of "each link in the chain of evidence relied upon to establish the guilt of the defendant," when standing alone is inaccurate and objectionable, but such instruction does not constitute reversible error when given with full, complete, and correct instructions on the subject of reasonable doubt. pp. 71, 72.

**SAME.—Instruction.—Good Character of Defendant.**—An instruction that, if the jury believed that the defendant was guilty as charged in the indictment, beyond a reasonable doubt, it would be their duty to convict him, though he had previously been of good repu-

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157	215
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tation for peace and quietude, was not prejudicial to the defendant when given in connection with other instructions properly charging the jury upon the question of defendant's good character. *p. 73.*  
**CRIMINAL LAW.—Assault and Battery with Intent.—Evidence.—Opinion of Witness.**—The opinion of a witness that a revolver used in committing an alleged assault and battery with intent to commit murder would not probably kill at a given distance is inadmissible in evidence. *p. 74.*

From the Tipton Circuit Court. *Affirmed.*

*Oglebay & Oglebay*, for appellant.

*W. A. Ketcham*, Attorney-General, *Merrill Moores* and *T. M. Butler*, for State.

**JORDAN, J.**—Appellant was charged by indictment with an assault on one George Goar with intent to commit murder in the first degree. A trial by jury resulted in his being convicted of an assault with the intent to commit the felonious crime of manslaughter, and over his motion for a new trial, he was sentenced by the court to be imprisoned in the State prison, north, for a period of not less than two and not more than fourteen years.

The only errors discussed by counsel for appellant are based on the action of the trial court in denying the motion for a new trial. This motion enumerated some thirty-five reasons, which in the main relate to alleged errors of the court in giving and in refusing to give certain instructions to the jury, and also in modifying some of the instructions tendered by the appellant and in giving them to the jury in a modified form. Several of the charges of which appellant complains pertain to the elements which enter into the crime of murder in the first and second degrees, and to matters relating to these two degrees of homicide; therefore, if it were conceded that all of these are erroneous, they would be considered harmless, and appellant would not be in an attitude to assail them for the reason that he stands convicted only of perpetrating an assault with the intent to commit the crime of manslaughter, the lowest degree of homicide, and as the

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element of malice, with or without premeditation, does not enter into this latter degree, it is not apparent how the instructions criticised by counsel for appellant which relate to the question of malice, and other questions pertaining wholly to the higher degrees of homicide, could have exerted any unfavorable influence over the jury in arriving at the verdict which they returned. *Jarrell v. State*, 58 Ind. 293; *Long v. State*, 95 Ind. 481.

There is no merit in the contention of appellant that instruction fourteen, given by the court in the series of those requested by the State, is prejudicial to his rights. This latter charge deals with the question of self-defense interposed in the case, and the only objection urged is that it is but a repetition of what the court had previously advised the jury upon the same question, with the addition that "the law does not permit a person to revenge himself in any case." The court, in its instructions upon the subject of reasonable doubt, seems to have advised the jury very fully in reference to the law applicable to that subject. Some of the court's charges upon this feature of the law are condemned by counsel for appellant; especially do they criticise number eighteen given at the request of the State. By this instruction the court substantially told the jurors that the rule, which required them to be satisfied of the guilt of the defendant beyond a reasonable doubt, did not require that they should be satisfied beyond such doubt of "*each link in the chain of evidence relied upon to establish his guilt.*" (Our italics.) The court, continuing in the charge, closed it with the following statement: "It is sufficient if, taking the evidence all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty." The part of this charge italicised, which informed the jurors that each link in the chain of evidence relied upon to establish the defendant's guilt was not required to be proved beyond a reasonable doubt, standing alone, may be said to be inaccurate and therefore objectionable. The court had previously advised the jury, by an in-

struction tendered by appellant, that the rule of reasonable doubt extended to every material allegation of the indictment, and had also said in another instruction that such a doubt might arise either from the evidence or lack of evidence in the case. The latter part of the instruction in question, in effect, it may be said, advised the jury that if all of the evidence taken together satisfied them beyond a reasonable doubt of the defendant's guilt, which was the ultimate question to be determined in the case, that it was sufficient.

The rule, as settled by the decisions of this court is, that instructions upon a subject must be considered and construed together and are not to be considered in detached parts, and when so considered, if they, as a whole, correctly declare the law, they will not be overthrown although some fragmentary or isolated parts thereof are not accurate or clear. Tested by this rule, it may be said that when the entire series of instructions, which the court gave on the question of reasonable doubt, is considered and construed together, the jury were properly advised on that subject, and therefore appellant's attack on that part of the instruction in controversy cannot be available in securing a reversal. *Koerner v. State*, 98 Ind. 7; *Rhodes v. State*, 128 Ind. 189; *Newport v. State*, 140 Ind. 299; *Hauk v. State*, 148 Ind. 238; *McIntosh v. State*, 151 Ind. 251.

It is true that the doctrine of reasonable doubt is applicable only to the constituent elements of the crime of which an accused party is charged, and to facts, or groups of facts, which constitute the entire proof of the material or elementary facts, and the rule does not apply or extend to each item of mere matters of subsidiary evidence. *Wade v. State*, 71 Ind. 535; *Davidson v. State*, 135 Ind. 254; *Hauk v. State*, *supra*. The proposition, which the court no doubt intended to announce by the figurative expression "each link in the chain of evidence," was that the State was not required to prove beyond a reasonable doubt every subsidiary or minor fact or circumstance in evidence which tended to establish

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the material or essential facts upon which the ultimate question of the defendant's guilt depended. This proposition is a correct one and is supported by the cases last cited and other authorities. The metaphor used by the court might be liable to misconstruction, and is therefore open to criticism, but, to repeat what we have heretofore said, when the court's charge upon the subject of reasonable doubt is considered as an entirety, this inaccurate expression is no ground, under the circumstances, for a reversal. It is claimed by the state's attorney that the instruction in question was borrowed from the decisions of a sister state. It may be said that the doctrine of reasonable doubt has been so fully expounded by the decisions of this court, that it would seem to be a rare occasion which would require a trial court to go into other states in search of the law upon the subject.

The court, in one of its series of instructions, told the jury, in effect, that, if they believed the defendant to be guilty, as charged in the indictment, beyond a reasonable doubt, it would be their duty to convict him, although they might be satisfied that, prior to the alleged shooting in question, the defendant sustained a good reputation for peace and quietude. The court had previously properly instructed the jury upon the question of the defendant's good character, which had been given in evidence, and as to the manner in which they were to weigh and consider this feature of the case along with all the other evidence, and had informed them relative to the effect and bearing which such character had upon the question of his guilt. Certainly all that can be inferred from the instruction of which appellant complains, when it is considered along with the other charge upon the subject of good character, is that if the jury upon the consideration of all the evidence found the defendant guilty beyond a reasonable doubt, then, under the circumstances, the mere fact that they were satisfied that his reputation for peace and quietude was good, could not avail him as a defense, and this is the only

reasonable inference that the jury could have drawn from the charge in controversy.

We have carefully examined all the instructions given, refused or modified, to which the argument or objections of appellant's counsel can be said to extend, and are fully satisfied that when the entire charge of the court to the jury is considered, it, as a whole, is as favorable to the defendant as he could legally demand, and we feel satisfied that none of his substantial rights in the premises can be said to have been prejudiced by the action of the trial court in either giving or refusing to give the instructions, and therefore his attack upon the rulings of the court in this respect must fail.

It is next urged that the court erred in not permitting the witnesses, Mrs. Boomershine, Mrs. Goar, and Mary Rains, to testify relative to certain matters. The record does not, however, disclose that appellant reserved the necessary exceptions to such rulings of the court; hence no question thereon is presented for our consideration. Appellant introduced a Mr. Recobs as a witness and inquired of him if a person, at a distance of 114 to 160 or 170 feet, would be in any danger of a shot fired from a pistol which was exhibited to the witness, it being the weapon used by the appellant at the time of the alleged assault. The witness replied that he could not tell whether it would shoot with sufficient force to kill a man at that distance. Counsel for appellant seemingly were not content with this answer, and again propounded substantially the same question to the witness and, upon an objection being interposed by the State and sustained by the court, then said: "We offer to prove by this witness that there would be no probability of inflicting any injury upon a person from 114 to 170 feet away with this revolver, except the one firing it was a skilled marksman." This evidence as offered the court rejected. It is apparent that by this evidence appellant sought to obtain but the bare opinion of the witness, and therefore it was properly excluded for this reason, if for no other.

The judgment is fully sustained by the evidence, and it in

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no manner appears that appellant has been prejudiced in the trial in any of his substantial rights. Therefore sound and well settled legal principles forbid us to interfere in the result reached in the lower court. Judgment affirmed.

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GISE v. COOK ET AL.

[No. 18,684. Filed January 4, 1899.]

**PLEADING.—Complaint.—Account, Action on.**—A complaint alleging that the "plaintiff and defendants have had mutual dealings for two years, each keeping his own accounts, the items of which are numerous; \* \* \* that there is due plaintiff as a balance on said mutual accounts about \$200," demanding an accounting and judgment, is insufficient, where the nature of the dealings between the parties is not stated and no copy of the account is made part of the complaint.

From the St. Joseph Circuit Court. *Affirmed.*

*Talbot & Talbot*, for appellant.

**MONKS, C. J.**—Appellant brought this action against appellees. Appellees' demurrer to the complaint for want of facts was sustained, and appellant refusing to plead further, judgment was rendered against him on demurrer.

It is insisted by appellant that the court erred in sustaining the demurrer to the complaint. It is alleged in the complaint that the "plaintiff and defendants have had mutual dealings for two years, each keeping his own accounts, the items of which are numerous; that at various times before this day, September 12, 1896, the plaintiff offered to produce his accounts, and requested the defendants to produce theirs, in order to come to a settlement of the said accounts, but the defendants refused to produce their accounts and to come to an adjustment; that there is due the plaintiff, as a balance on said mutual accounts, about \$200." Prayer for accounting and judgment.

Appellant contends that the complaint was sufficient to withstand the demurrer, for the reason that "equity assumes

jurisdiction when accounts are mutual." Whether or not this action was one of equitable jurisdiction prior to the code of civil procedure is not material, because such fact only goes to the question of whether the cause is triable by the court or jury, and cannot affect the sufficiency of the complaint. Section 341 Burns 1894, section 338 Horner 1897, provides that a complaint shall contain "a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Section 365 Burns 1894, section 362 Horner 1897, provides that "when any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading."

The complaint in question does not comply with the requirements of these sections. It does not state the nature of the dealings between appellant and appellees. The allegations in this respect are not such that a person of common understanding can know what is sued for, whether it is work or labor, goods, wares and merchandise, money had and received, or what. The allegation that there is due appellant, as a balance on said account, about \$200, is a mere conclusion of the pleader, and not the statement of a fact. It is alleged that each party kept his account, yet appellant has not filed his account, or a copy of it, with the complaint as an exhibit, or otherwise made the same a part of the complaint as required by sections 365, 362, *supra*. The complaint was, therefore, insufficient for this reason. *Peden v. Mail*, 118 Ind. 556; *Lassiter v. Jackman*, 88 Ind. 118, 120; *City of Connersville v. Connersville, etc., Co.*, 86 Ind. 235; *Wolf v. Schofield*, 38 Ind. 175.

It is manifest that the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.



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Woolverton v. Town of Albany.

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## WOOLVERTON ET AL. v. THE TOWN OF ALBANY.

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[No. 18,661. Filed January 5, 1899.]

MUNICIPAL CORPORATIONS.—*Changing of Boundary Lines.*—The creation, enlarging, and contraction of boundaries of municipal corporations are legislative, and not judicial functions, and may be exercised without the consent, and against the remonstrance of those interested. p. 78.

SAME.—*Disannexing Territory.*—*Courts are Without Jurisdiction.*—Where the board of trustees of an incorporated town refuses to act upon a petition, under section 3248 Horner 1897, asking that certain territory be disannexed, an action will not lie to disannex such territory. p. 80.

From the Delaware Circuit Court. *Affirmed.*

J. W. Ryan, W. A. Thompson, W. W. Mann and Lincoln Lesh, for appellants.

R. S. Gregory, A. C. Silverburg and O. J. Lotz, for appellee.

MONKS, C. J.—In 1893 appellee was duly incorporated as a town by order of the board of commissioners, under the provisions of sections 4314-4322 Burns 1894, sections 3293-3301 Horner 1897. Several tracts of unplatted land used exclusively for agricultural purposes were included within the boundaries of said incorporated town. Afterwards, in 1896, each of appellants, being the owners of such tracts of land, filed his petition with the board of trustees of said town under the provision of section 4230 Burns 1894, section 3248 Horner 1897, asking the board of trustees of said town to modify the boundaries of said town so as to exclude therefrom said tracts of land, and the board of trustees refused to act upon said petitions. Afterwards, on January 4, 1897, three and one-half years after the order incorporating said town was made, appellants commenced this action in the court below to disannex said tracts of land from said town. The foregoing facts are set forth in said complaint, and, in addition, it is alleged, in substance, that the promoters of said in-

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Woolverton v. Town of Albany.

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corporation represented to appellants that their land should not be taxed for town purposes, which representation was believed and relied upon by appellants, and by the citizens and voters of said town, and that by means of said representations the said lands of appellants were included within the incorporated limits of said town; that said lands are not necessary to the growth of said town, nor are they needed for any town purposes, and are less valuable, and receive no benefit, by reason of their being within the corporate limits of said town, and the only benefit said tracts of lands are to said town is on account of the tax derived therefrom. Appellee's demurrer, assigning as grounds therefor want of facts, and want of jurisdiction over the subject-matter of the action, was sustained to said complaint, and appellants refusing to plead further, judgment was rendered against them. The errors assigned call in question the action of the court in sustaining the demurrer to the complaint.

It is settled law that the creation, enlarging, and contraction of the boundaries of municipal corporations are legislative, and not judicial, functions, and may be exercised by the legislature without the consent, and against the remonstrance of those interested. *Paul v. Town of Walkerton*, 150 Ind. 565, and authorities cited; 1 Dillon Munic. Corp., (4th ed.), section 37, 85, 183, 185, 186; Cooley Const. Lim. (6th ed.) 228; *Martin v. Dix*, 52 Miss., 53, 24 Am. Rep. 661; *Norris v. City of Waco*, 57 Tex. 635; *President and Council, etc., v. Society, etc.*, 24 N. J. L. 385; *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Coles v. County of Madison*, 1 Ill. 154, 12 Am. Dec. 164; *Grady v. County Commissioners, etc.*, 74 N. C. 101; *Manly v. City of Raleigh*, 4 Jones Eq. (N. C.) 370; *City of St. Louis v. Russell*, 9 Mo. 507; *St. Louis v. Allen*, 13 Mo. 400, 412; *Walden v. Dudley*, 49 Mo. 419; *Giboney v. City of Cape Girardeau*, 58 Mo. 141; *McCormick v. St. Louis, etc., R. Co.*, 20 Mo. App. 640; *Darby v. Sharon Hill*, 112 Pa. St. 66, 4 Atl. 722; *Smith v. McCarthy*, 56 Pa. St. 359; *De-*

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*vore's Appeal*, 56 Pa. St. 163; *State v. Lake City*, 25 Minn. 404; *Coolidge v. Brookline*, 114 Mass. 592; *Stone v. City of Charlestown*, 114 Mass. 214; *McCallie v. Mayor, etc., of Chattanooga*, 3 Head (Tenn.) 317; *Wade v. City of Richmond*, 18 Gratt (Va.) 583; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Kelley v. Pittsburg*, 104 U. S. 78; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 103; *State v. Cincinnati*, 52 Ohio St., 419, 40 N. E. 508, 27 L. R. A. 737, and note; *Metcalf v. State*, 49 Ohio St. 586, 31 N. E. 1076; *Blanchard v. Bissell*, 11 Ohio St. 96; *People v. Carpenter*, 24 N. Y. 86.

General laws providing the conditions upon which cities and towns may be incorporated as municipal corporations, with or without the consent of those interested, and vesting the power in judicial bodies to determine whether such conditions exist, and, if so, to order such incorporation, are valid. *Paul v. Town of Walkerton*, 150 Ind. 565, and cases cited; *Forsythe v. City of Hammond*, 142 Ind. 505, 516-519, 30 L. R. A. 576; *Forsythe v. City of Hammond*, 68 Fed. 774; *State v. Cincinnati*, *supra*; *Blanchard v. Bissell*, 11 Ohio St. 96; *People v. Carpenter*, 24 N. Y. 86; *Devore's Appeal*, 56 Pa. St. 163; *Beach on Pub. Corp.*, sections 399, 406, 408.

In such case the creation of the corporation is not the act of the court or other body, but is the act of the law. If the facts exist under the law, the board of commissioners or the court of appeal has no discretion, and can exercise none, but must order the incorporation of such town or city. *Forsythe v. City of Hammond*, 142 Ind. 505, 517, 518.

Appellants, by filing their petition with the board of trustees of appellee, under section 4230 Burns 1894, section 3248 Horner 1897, to disannex their lands from said town, and by bringing this action against the town for the same purpose, recognize the existence of appellee as a municipal corporation. The theory of the complaint is that appellee was incorporated, but for the reason set up in the complaint, appellants are entitled to have the boundaries of appellee so

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changed as to exclude their lands. The only statute on that subject to which our attention has been called provides that such power may be exercised by the boards of commissioners on petition of the common councils of cities, and the boards of trustees of towns or by the common councils of cities and the board of trustees of towns upon petition of the owners of such real estate, upon the conditions therein set forth. Sections 4228-4230 Burns 1894, sections 3247-3249 Horner 1897.

Under the authorities cited, the power to contract or change the boundaries of a city or town is a legislative power, and cannot be exercised by the courts, and as no law fixing the conditions upon which this may be done, and vesting the power in the court to disannex territory or otherwise change such boundaries if such conditions exist, the court below had no jurisdiction in this action.

It follows from what we have said and the authorities cited that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

**LAPLANTE v. STATE, EX REL. GOODMAN, PROSECUTING ATTORNEY.**

[No. 18,668. Filed January 6, 1899.]

**TAXATION.—Failure to List Property.—Complaint.**—In an action against a taxpayer to recover penalties for failure to list property for taxation, each year's failure constitutes a separate cause of action, and should be stated in a separate paragraph of the complaint. *pp. 82, 83.*

**SAME.—Harmless Error.—Overruling Motion to Paragraph the Complaint.**—The action of the court in overruling a motion to require the State, in an action to recover the penalty for failure to list property for taxation, to state each year's failure in separate paragraphs is harmless, where the State elected to ask a recovery for one particular year only. *p. 83.*

**PLEADING.—Legal Capacity to Sue.—Demurrer.**—Absence of legal capacity to sue is prescribed by the code as one of the causes of

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demurrer to a complaint, and such question cannot be presented on appeal where the same was not assigned as cause for demurrer. *pp. 83, 84.*

**TAXATION.—Failure to List Property.—Action.—Relator.**—An action by the State for failure to list property for taxation is properly brought on the relation of the prosecuting attorney. *p. 84.*

**SAME.—Failure to List Property.—Complaint.**—A complaint in an action by the State on the relation of the prosecuting attorney for the recovery of the penalty provided by statute for failure to list property for taxation which discloses that the omitted property consisted of money, bonds, mortgages, notes, etc., subject to taxation, is sufficient without averring the value of the particular property. *p. 84.*

**SAME.—Failure to List Property.—Penalty.**—A penalty of \$1,500 for failure to list property for taxation is not excessive, where the evidence showed that defendant omitted from his tax list over \$20,000 worth of property held by him, subject to taxation, and converted about \$1,800 for the purpose of avoiding taxation. *p. 84.*

**PLEADING.—Amendment.**—The action of the court in permitting plaintiff to amend his complaint after the jury was impaneled, and during the trial, will not be reviewed on appeal, where an abuse of discretion to the prejudice of defendant's substantial rights is not shown. *pp. 84, 85.*

**APPEAL AND ERROR.—Evidence.—Admission.—Exception.**—No question is presented on appeal as to the action of the court in sustaining an objection to a question propounded to a witness by merely reserving an exception to such ruling. *p. 85.*

**INSTRUCTIONS.—Must be Considered Together.**—An inaccurate instruction will not operate in reversing a judgment, where the instructions considered as a whole correctly advised the jury relative to the law by which they were to be controlled in arriving at a verdict. *p. 85.*

**APPEAL AND ERROR.—Erroneous Instructions.—When Cause Will Not be Reversed on Account of.**—The Supreme Court will not reverse a judgment on account of erroneous instructions, where the evidence clearly establishes that appellant was guilty of the wrong imputed to him under the complaint. *p. 85.*

From the Knox Circuit Court. *Affirmed.*

*H. S. Cauthorn, C. E. Dailey and H. S. Cauthorn, Jr.,*  
for appellant.

*W. A. Cullop, C. B. Kessinger and J. I. Goodman,* for  
appellee.

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*LaPlante v. State, ex rel.*

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JORDAN, J.—This action was prosecuted against appellant in the name of the State on the relation of the prosecuting attorney, under section 8465 Burns 1894 (section 55, Acts 1891, p. 217), to recover a penalty on account of his making a false and fraudulent list or schedule of his taxable property. A trial by jury resulted in a finding in favor of the State and the penalty assessed by the jury was \$1,500, and, over appellant's motion for a new trial, judgment was rendered upon the verdict.

The complaint, among other things, charges that appellant failed and refused to give a true list of his personal property subject to taxation on the 1st day of April for the years 1881 up to and including the year 1896; that when the assessor called upon him in each of said years for a list of all of his personal property, including money, rights, credits, bonds, and choses in action, he returned to said official a list which was not a true and correct one of his money, rights, credits, bonds, and choses in action, but that he returned a false and fraudulent list in this, to wit: That he omitted from his said list in each of said years certain described mortgage notes, bonds, cash, and choses in action, which he, appellant, held and owned, subject to taxation, on the 1st day of April of each of said years. The complaint also charges other fraudulent omissions and conversions by appellant of his property for the fraudulent purpose of avoiding taxation, and an itemized statement of the property which he failed to list is filed with and made a part of the complaint.

Appellant unsuccessfully moved the court to require the plaintiff to paragraph its complaint, in order that his failure to list property for each of the years, as therein charged, should be stated in separate paragraphs. The action of the court in denying this motion is complained of, and it is claimed that it constitutes reversible error. In actions of this kind to recover penalties for a failure to list property upon the part of a taxpayer, each year's failure consti-

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*LaPlante v. State, ex rel.*

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tutes a separate cause of action, and ought to be stated in a separate paragraph of the complaint. *State v. Halter*, 149 Ind. 292.

The record, however, in the case at bar discloses that the court, in its instructions to the jury, stated to them that the plaintiff had elected to ask a recovery against the defendant for the year of 1895 only, and it further directed the jury in its instructions to confine their inquiry, under the evidence, to that year alone. Therefore, under the circumstances, it may be said that it affirmatively appears from the record that the recovery against appellant was for the year 1895, and no other; hence, the ruling of the court upon the motion to paragraph must be deemed to be harmless, and is not available to constitute reversible error. This court has held that, as a general rule, denying a motion to paragraph a complaint is not sufficient ground for a reversal of a judgment. *Wabash, etc., R. Co. v. Rooper*, 90 Ind. 581. Appellant challenges the constitutional validity of the provisions of the statute in question, but we need consume no time upon the consideration of this question, as the validity of the law is fully sustained by the decisions of this court. *Burgh v. State*, 108 Ind. 132; *State v. Halter*, 149 Ind. 292.

A demurrer to the complaint upon the grounds of improper joinder of causes of action, and insufficiency of facts, was overruled, and this ruling is assigned as error, and thereunder counsel for appellant specify four reasons which, as they claim, render the complaint fatally defective: (1) It does not show the capacity of the relator to prosecute this action; (2) it does not appear from the complaint that the suit was instituted by the proper relator; (3) it does not allege that the property omitted by appellant was of any value; (4) a copy of appellant's tax list for the year of 1895 ought to have been filed with and made a part of the complaint.

Absence of legal capacity to sue is prescribed by the code as one of the causes of demurrer to a complaint. Section 342 Burns 1894, section 399 Horner 1897. Appellant, as

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*LaPlante v. State, ex rel.*

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we have seen, did not assign this cause as one for demurrer; hence, he is not now in a position to assail the complaint upon that ground. *Edwards v. Beall*, 75 Ind. 401. The complaint sufficiently discloses that the action was instituted on the relation of the proper person, and it also shows that the omitted property consisted of cash, money, bonds, mortgage notes, etc., subject to taxation. This was sufficient without averring the value of this particular property. *Swift v. State*, 3 Ind. App. 285. A copy of appellant's tax list or schedule for the year 1895 was not required to be filed as an exhibit with the complaint. *State v. Halter*, 149 Ind. 292.

It is true, as insisted by appellant's learned counsel, that the complaint is not a model pleading, but it sets out facts which constitute the wrong which the statute condemns, and is substantially sufficient to repel a demurrer.

It is next insisted that the court erred in overruling the motion for a new trial, and the first contention is that the penalty assessed is excessive and not sustained by the evidence. There is evidence in the case which shows that appellant on April 1, 1895, owned and held bonds, money, stocks, mortgage notes, etc., subject to taxation, of the value of \$27,000, and over. It appears from the evidence that in that year he omitted from his tax schedule or list over \$20,000 of this property, besides converting a certain sum of money of about \$1,800, for the purpose of avoiding taxation. We have examined the evidence and are satisfied that it fully sustains and justifies the verdict of the jury and the judgment of the court thereon.

After the jury was impaneled and during the trial, the court permitted the plaintiff to make an amendment to the complaint, and objections are urged in regard to this action of the court. The amendment, however, was a discretionary matter with the trial court and it does not appear that it was abused to the prejudice of any of appellant's substantial rights; hence, under a well settled rule, the action of the



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*LaPlante v. State, ex rel.*

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court in permitting the amendment is not open to review in this court. The complaint is also made that the court erred in not permitting a witness named to answer a certain question propounded to him by appellant. The record, however, discloses only that this witness was asked the question by counsel for appellant, to which counsel for appellee objected, and this objection was sustained by the court and an exception reserved on the part of appellant. This is not sufficient to present any question for our consideration in respect to this ruling of the court. Elliott's App. Proc. sec. 743, and cases there cited; *Rains v. State, ante*, 69.

Counsel for appellant claim that two of the instructions given by the court are erroneous. We have examined the entire charge of the court given to the jury, and when the instructions are considered and construed as a whole and not in detached and isolated parts, they correctly advised the jury relative to the law by which they were to be controlled in arriving at a verdict, and hence, if the insistence of counsel relative to the inaccuracy of the instructions in question be granted, it would not operate in reversing the judgment. *Rains v. State, supra*, and cases there cited. Again, upon another view of the case, the evidence so clearly establishes that appellant is guilty of the wrong imputed to him under the complaint, and the one which the statute condemns, that, were the alleged errors relative to the instructions in question conceded to exist, this court, in consideration of section 658 R. S. 1881, section 670 Burns 1894, would not be justified in disturbing the judgment of the trial court. The death of appellant since the submission of this appeal being suggested, the judgment is therefore ordered by the court to be affirmed as of the date of submission.

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Hilliker v. Citizens Street R. Co.

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HILLIKER, ADMINISTRATOR, v. CITIZENS STREET RAIL-  
WAY COMPANY.

[No. 18,453. Filed Jan. 10, 1899.]

**PERSONAL INJURIES.**—*When Death of Injured Person Abates the Action.*—In the absence of statutory enactments, actions for injuries to the person abate on the death of the person injured, and do not survive to the personal representatives. *p. 87.*

**STATUTES.**—*Construction of when Reënacted.*—When the legislature reënacts a statute of the state, it adopts also the construction given to such statute by the courts of the state before such reënactment. *p. 88.*

**PERSONAL INJURIES.**—*Damages for Pain and Suffering.*—*Action Abates with Death of Injured Person.*—Under section 283 Horner 1897, providing that a cause of action arising out of an injury to the person dies with the person, except where a right of action is given for injury causing death, an action cannot be maintained by an administrator for damages for the physical pain and suffering of his intestate, since such right of action abates on the death of the intestate. *pp. 86-89.*

From the Marion Superior Court. *Affirmed.*

*George W. Galvin*, for appellant.

*W. H. Latta* and *Ferdinand Winter*, for appellee.

**MONKS, C. J.**—The appellant brought this action against appellee. The complaint was in two paragraphs, and appellee's demurrer to each paragraph was sustained, and, appellant refusing to plead further, judgment was rendered against him on demurrer. The errors assigned call in question the action of the court in sustaining said demurrer to each paragraph of the complaint.

The first paragraph seeks to recover damages, not for the death of appellant's intestate, but for physical pain and suffering, and the mental anguish caused thereby, being such damages only as the intestate could have recovered if he had lived. It is not averred in said paragraph that the deceased left surviving him a widow or next of kin, but, on the contrary, it is averred that he left no father or mother or next

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of kin surviving him. The cause of action set forth in said paragraph is in tort, and the facts alleged would have entitled the decedent to a recovery if he had lived.

It is admitted by counsel for appellant that at common law the cause of action set up in the first paragraph of the complaint died with the deceased, and did not survive; but it is insisted that the rule in this respect was changed by section 283 Burns 1894, section 282 Horner 1897, and that under the provisions of said section the right of the deceased to recover damages for his physical pain and suffering, and mental anguish caused thereby, did not die with the deceased, but survived, and the same may be recovered in an action by his administrator. It is settled law that, in the absence of statutory enactments, actions for injuries to the person abate on the death of the person injured, and do not survive to the personal representatives. *Burns, Adm., v. Grand Rapids, etc., R. Co.*, 113 Ind. 169. Unless, therefore, some statute revives the common law right of action for a personal injury, and makes it survive the death of the injured person to his representatives, no cause of action is stated in said first paragraph.

In 1852 the legislature adopted a code of civil procedure, section 782, of which, 2 G. & H. p. 330, is the same as section 283 Burns 1894, section 282 Horner 1897, except that the last named section contains in addition to what is set forth in section 782, *supra*, the words "malicious prosecution." It was held by this court, in *Stout, Adm., v. Indianapolis, etc., R. Co.*, 41 Ind. 149, decided at the November term, 1872, of this court, that a cause of action arising out of injuries to the person died with the person, and did not survive, under the provisions of section 782, *supra*. The case of *Stout, Adm., v. Indianapolis, etc., R. Co.*, *supra*, was cited with approval, and the same doctrine declared, in *Indianapolis, etc., R. Co. v. Stout, Adm.*, 53 Ind. 143, decided in 1876. See also *Hilker, Adm., v. Kelley*, 130 Ind. 356; *Burns, Adm., v. Grand Rapids, etc., R. Co.*, 113 Ind. 169, 171. This was the set-

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tled judicial construction of said section 782, *supra*, in 1881 when the present code of civil procedure was enacted by the legislature. Section 6 of said code, being section 283 Burns 1894, section 282 Horner 1897, was a reënactment of said section 782, *supra*, of the code of 1852, except that the words "malicious prosecution" were added thereto. It is the settled rule that, when a legislature reenacts a statute of the state, it adopts also the construction given to such statute by the courts of such state before such reënactment. Endlich on Interp. of Stat., sections 368, 371, and cases cited in notes; Suth. on Stat. Con., section 256 on pp. 336, 337; Black on Interp. of Stat., pp. 161, 162. It follows, therefore, that the legislature in reënacting section 782, *supra*, of the code of 1852, as section 283 Burns 1894, section 282 Horner 1897, adopted the construction given by this court to section 782, *supra*, in the cases above cited, and that a cause of action for injuries to the person does not survive, but dies with the person.

In *Burns, Adm., v. Grand Rapids, etc., R. Co.*, 113 Ind. 169, this court, speaking in regard to the statutes on the subject of actions for the death of another, said: "These statutes, while they do not in terms revive the common law right of action for personal injury, nor make it survive the death of the injured person, create a new right in favor and for the benefit of next of kin or heirs of the person whose death is wrongfully caused." In *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, this court, in speaking on the same subject, at page 113, said, "The pain and suffering endured, and the permanent injury resulting from the wounding or maiming of a minor, are personal to himself, and damages for such pain and injuries are always recoverable for his benefit. We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary

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loss by the death, and not for the benefit of the decedent's estate."

It is evident that the actions arising out of injuries to the person, other than seduction, false imprisonment, and malicious prosecution, which section 283 Burns 1894, section 282 Horner 1897, provides do not abate on the death of the person, are the actions provided for in sections 267, 285 Burns 1894, sections 266, 284 Horner 1897. Under said sections actions can only be maintained by the father or mother, depending upon the facts of the case, or by the personal representative for the benefit of the widow and next of kin, and not for the benefit of the decedent's estate. The court did not err, therefore, in sustaining the demurrer to the first paragraph of complaint.

Appellant having failed to discuss the assignment of error calling in question the action of the court in sustaining the demurrer to the second paragraph of the complaint, the same is waived. Judgment affirmed.

**STUDABAKER v. STUDABAKER, ET AL.**

[No. 18,496. Filed Nov. 17, 1898. Rehearing denied Jan. 11, 1899.]

**DRAINS.—Assessments.—Injunction.**—An injunction will not lie to prevent the collection of an assessment made for the construction of a public ditch for the reason that the ditch was not constructed according to the plans and specifications, where the complaint does not impute any invalidity to the proceedings establishing the ditch. *pp. 90-95.*

**SAME.—Public Ditch.—Construction.—Duty of Engineer.**—It is the duty of the engineer who is appointed by the board of commissioners to superintend the construction of a public ditch, under the provisions of section 5690 *et seq.* Burns 1894, to see that the ditch is completed according to the terms of the contract, and upon the failure of the contractor to complete the work according to contract the engineer is invested with the power to have the job resold. *pp. 95, 96.*

**SAME.—Public Ditch.—Board Determines when Ditch is Completed.**—The board of commissioners determines when a public ditch, constructed under the provisions of section 5690 *et seq.* Burns 1894, is completed according to the terms of the contract. *p. 96.*

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152	701
152	89
154	241
156	589
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157	307
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164	664
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169	87
169	88
169	93
170	531

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**DRAINS.—Completion.—Right of Landowner to be Heard.**—The act of 1891 (section 5690 *et seq.* Burns 1894) providing for the construction of public drains contemplates that the petition for the proposed ditch shall remain upon the docket until the final completion of the work; that when the work is completed the engineer is to make a final report to the board for its approval, and any landowner whose land is affected by the improvement is entitled to appear before the board and controvert the question of the completion of the ditch. *pp. 96, 97.*

**SAME.—Assessments.—Injunction.—Complaint.**—Before an action to enjoin the collection of an assessment for a public ditch can be maintained, the portion of the tax which is valid must be paid or a tender thereof made, and such fact must be alleged in the complaint or it will not be sufficient to repel a demurrer. *p. 97.*

**SAME.—Assessments.—Injunctions.—Complaint.**—An averment in a complaint to enjoin the collection of a ditch assessment that plaintiff has paid all the taxes due is but a conclusion of the pleader, and will be disregarded. *p. 97.*

From the Wells Circuit Court. *Affirmed.*

*Levi Mock, John Mock and George Mock*, for appellant.

*J. S. Dailey, A. Simmons and F. C. Dailey*, for appellees.

**JORDAN, J.**—Appellees are the auditor and treasurer of Wells county, and appellant unsuccessfully sought to enjoin them from selling her real estate in satisfaction of a lien existing against it growing out of benefits assessed for the construction of a public ditch.

The complaint is in two paragraphs, the facts alleged in each being substantially alike. The lower court held each paragraph of the complaint insufficient on demurrer, and this ruling is the only error assigned in this appeal. The first paragraph of the complaint, by its averments, substantially discloses that in June, 1892, under an act of the legislature entitled "An act concerning drainage, etc.," approved March 7, 1891, a petition for the construction of a ditch was presented to the board of commissioners of Wells county. Such proceedings were had thereon that the board appointed three viewers who reported favorably on the construction of the proposed ditch and designated the line, or the route over

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which it should be located, the manner of its construction, and the estimate of its cost, and assessed benefits to the respective tracts of land which would be benefited by the work, including the real estate of appellant. All of which matters set forth in such report of the viewers appears to have been confirmed and approved by the board, and the ditch was ordered to be established, and constructed; and, for the purpose of carrying this order into effect, the board appointed the surveyor of the county as an engineer to superintend the construction of the ditch. Contracts for the construction of the improvement were let accordingly, the contractors executing bonds as required by law.

The board of commissioners appear to have issued bonds of the county and negotiated them to raise money necessary to pay the cost and expenses incident to the construction of the ditch. After letting the work, the board directed that the assessments against the lands be placed upon the ditch tax duplicate, which order was accordingly carried into effect by the auditor.

The complaint avers that the auditor "wrongfully, unlawfully, and without right" placed upon the tax duplicate against plaintiff's real estate the sum of \$1,422.21 and it is alleged that said assessment is unjust and void for the following reasons: "First, that said ditch was never constructed according to said plans and specifications as mentioned in said report and as confirmed by said board of commissioners, in the following particulars, to wit, that the excavation of said ditch was made with a dredge and the banks of said ditch were made perpendicular and uneven with no slope whatever and the bottom of said ditch was uneven, in holes, and covered with loose dirt; that the dirt was thrown out in piles and no slope whatever given same."

As a second reason it is stated, that, notwithstanding the specifications required the ditch to be of a certain width from stake No. 248 to stake No. 501, the board of commissioners, without any "legal notice and contrary to law and in

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disregard of plaintiff's rights" after the contracts for the construction of the ditch had been let, and after the assessments had been made, by an order entered of record, changed the specifications so as to diminish the width of the ditch between the aforesaid mentioned stakes.

It is further averred that the contractors have been discharged and that the commissioners do not propose to complete the ditch and that, owing to the fact that the construction of said work has not been completed according to the original specifications, the work is of no benefit to the lands of the plaintiff, and that said lands have been advertised for sale on February 8, 1897, by the auditor of the county who is proposing to sell the same to satisfy an installment of said ditch assessment amounting to \$489.87. The plaintiff, it is alleged, "has paid all the taxes justly due from him," and the prayer of the plaintiff is that a restraining order be granted, restraining the sale of the land in satisfaction of the installment mentioned, and that the assessments, on final hearing, be adjudged void, and the defendants be perpetually enjoined from enforcing the payment thereof.

The act under which the proceeding before the board of commissioners to construct the ditch in controversy, was enacted in 1891. See Acts of 1891, p. 455, section 5690 Burns 1894, and sections following. The first section of this statute authorizes the board of commissioners to locate and construct any ditch five miles and more in length upon the filing of the required petition. Section two designates the number of landowners who must petition for the improvement, and provides what facts shall be set forth in the petition, etc. The next section provides for the appointment of three viewers and prescribes their duties and the character of the report which they are required to make to the board of commissioners, etc. Section four relates to the time to be fixed for hearing the particular matters and things set out in the report of the viewers; also, as to the required notice to be given to the several landowners of the time fixed for the



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hearing of the report. Section five provides for the meeting of the board, the time fixed to hear the report, and authorizes the commissioners, if they find it to be fair and just according to benefits, to approve and confirm the same. Sections six and seven relate to taking appeals to the circuit court by any aggrieved party, and section eight makes provisions for fixing a time to let the contracts for the construction of the work and further provides that the surveyor or engineer appointed by the commissioners shall be directed by them to superintend the letting of such contracts, and requires the contractors to execute bonds conditioned for the faithful performance of their contracts, and for the completion of the work within the time fixed therein.

Section nine, among other things, provides for the surveyor or engineer appointed to superintend the construction, after he has let out the work, to make a report of his doings to the auditor who is authorized to approve the bonds of the contractors. The board of commissioners under this section, after the report of the engineer is made, is authorized to either approve or disapprove the contracts let by him, and it is provided that each contractor shall be liable on his bond for all delays after the expiration of the time fixed for the completion of his respective job, and for the payment of all damages which shall accrue by reason of his failure to complete the same within the time required.

Section ten provides that a job not completed within the prescribed time, shall be resold without notice to the lowest responsible bidder, but the same shall not be sold for a sum greater than the estimate, nor shall it be sold a second time to the same party. Sections eleven, twelve, and thirteen provide that when the cost and expense of construction, and all compensation and damages are ascertained, the commissioners are to meet and determine at what time, and in what number of assessments they will require the same to be paid, and are authorized to order the assessments as confirmed by them, to be placed upon the tax duplicate against the lands

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assessed, and in order to raise money to pay such cost and expenses, the board is empowered to issue and negotiate the bonds of the county, such bonds to be secured and payable out of the money derived from the assessments, and not otherwise. Assessments against the lands benefited, as provided by section twelve, are made a first and paramount lien thereon, in the same manner and form as other taxes.

Section fourteen makes the surveyor or engineer, auditor, board of commissioners, and clerk of the circuit court liable to a fine of \$25 for the neglect of any duty imposed by the act in question; and section seventeen declares that the collection of taxes, under the act, shall not be enjoined nor declared void in consequence of any technical error committed by the viewers, engineer, county auditor, or board of commissioners; and section nineteen directs that the engineer appointed to superintend the work shall give a bond for the faithful performance of his duties and authorizes an action thereon by any person aggrieved by his failure to discharge such duties. By section twenty-one, after the construction of the ditch, the landowners through whose lands it is established, are required to keep it open and free from obstructions.

It is apparent, we think, that the provisions of the above act are ample for the complete construction of any ditch proposed and authorized to be established or constructed thereunder. The complaint, however, proceeds upon the theory that the installment of the benefits assessed against the land of appellant, for the payment of which appellees are proposing to sell her real estate, is absolutely void for the reason that the ditch has not been completed as provided for under the original specifications. The facts and matters, alleged in the complaint and upon which appellant bases her right to an injunction, do not pertain to the original proceedings to establish the ditch.

Neither the proceedings under which the work of constructing the ditch was inaugurated, nor the assessments as

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originally confirmed, nor the final order directing the proposed work to be carried into effect, are challenged, and all of said proceedings or acts of the commissioners, under the facts, must be presumed to have been, in all respects, regular, and as conforming to the requirements of the law. The complaint does not impute any invalidity to the proceedings establishing the ditch for the reason that the board of commissioners was not invested with jurisdiction over the subject-matter, or on account of the absence originally of notice to appellant whose land is affected by the construction of the improvement. By the provisions of section seventeen of the act itself, which provision is but a recognition of the general principle, no irregularity upon the part of the board of commissioners, or other designated officials, can be made available to defeat by injunction the collection of taxes ordered to be levied for the construction of the work.

That a landowner cannot by a suit for an injunction obtain a review of the assessment of benefits against his land for the construction of a public ditch, is settled by our decisions. If such proceedings are absolutely void, a suit for an injunction can be maintained, but, if not void, the plaintiff cannot prevail, no matter how erroneous or irregular such proceedings may be shown to have been. *Montgomery v. Wasem*, 116 Ind. 343; *Indianapolis, etc., Gravel Road Co. v. State, ex rel.*, 105 Ind. 37; *Sunier v. Miller, Aud.*, 105 Ind. 393; *Cauldwell v. Curry, Treas.*, 93 Ind. 363; *Muncey v. Joest, Treas.*, 74 Ind. 409; *Shrack v. Covault*, 144 Ind. 260; *Duncan v. Lankford, Treas.*, 145 Ind. 145.

There is no doubt but what it is the duty, under the law, of the engineer who is appointed by the board as a superintendent, to see that the work of constructing the ditch is fully completed, as provided by the order of the board and the terms of the contract. *Racer v. State*, 131 Ind. 393. If a contractor fails or neglects to complete his job according to his contract, the engineer is certainly the proper person, and is invested with the power to have the job resold as provided

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by section ten of the act in question. See *Commissioners, etc.*, v. *Krauss*, 53 Ohio St. 628, 42 N. E. 831. While there is no express provision in the statute requiring the board to determine when the ditch has been completed as ordered and designated in the contract of the contractors, still the law fairly implies and intends that the board shall perform this duty. It is an elementary rule that the grant of a principal power carries with it all necessary, subsidiary or implied powers; hence, the board of commissioners, under the express authority conferred upon it by the statute, to order the construction of such public improvement, is invested with such incidental or implied powers as are necessary to fully carry out the completion of the work. The discharge of such duties is as incumbent upon the board as are those expressly imposed.

In practice, it may be asserted that the law contemplates that the matter of the petition for the proposed ditch, or other improvement, shall remain upon the docket of the board of commissioners until the final completion of the work. The law, undoubtedly, further contemplates that when the work is completed according to contract, the engineer, who acts as a superintendent, is to make a final report to the board for its approval, and one of the essential matters, to be determined by the board in approving such report, is whether or not the work has been completed according to contract.

Any landowner, whose land is affected by the improvement would certainly be entitled to appear before the board and controvert the question of the completion of the ditch. *Smith v. State, ex rel.*, 117 Ind. 167; *Perkins v. Hayward*, 132 Ind. 95. This view of the case is incompatible with the contention of counsel for appellant that the law is invalid for the reason that the landowner is afforded no opportunity to be heard in respect to the final completion of the ditch. The mere fact that the ditch, in this case, has not been completed according to the plans and specifications, cannot be accepted

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as a sufficient ground for enjoining the collection of the assessment. *Muncey v. Joest, Treas.*, 74 Ind. 409.

In the appeals of the *Indianapolis, etc., Gravel Road Co. v. State, ex rel.*, 105 Ind. 37, and *Racer v. State*, 131 Ind. 393, it was held that the landowner could not successfully interpose as a defense to the action to collect the ditch assessment the fact that the work had not been done and completed as required by the order of the court. His remedy, it was said in the latter case, was to apply to the court, whose agent the drainage commissioner is, to compel him and the contractor also to perform their duties. If the ditch in dispute has not been completed according to the terms of the contract which terms, we must presume, conform to the original specifications and order of the board of commissioners, and the appellant has been damaged by the failure to complete it, under the law, she has a remedy, and ample provisions are made by the statute for enforcing the completion of the work. But, it is evident that, under the facts, appellant can not invoke the writ of injunction to defeat the collection of the entire benefits assessed against her land.

If any portion of the tax in question is invalid, the part thereof which is valid ought to have been paid, or a tender of the money in payment thereof ought to have been made before an action to enjoin the collection of the residue could be maintained, and such tender, if refused, must be kept good by paying the money into court. These facts, in such cases, must be alleged in the complaint or it will not be sufficient to repel a demurrer. *Bundy v. Summerland, Treas.*, 142 Ind. 92, and cases there cited. Even though it could be held that a part of the tax in dispute is illegal, the complaint is fatally defective in not disclosing that the plaintiff has complied with the rule in respect to payment or tender. The averment that she has paid all the taxes due is not sufficient. Such an averment is but a conclusion upon the part of the pleader and therefore must be disregarded.

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Neither of the paragraphs of the complaint is sufficient, and the demurrer was properly sustained. Judgment affirmed.

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### WILLIAMS v. ATKINSON.

[No. 18,098. Filed Jan. 12, 1890.]

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**BOUNDARIES.—Surveyor's Record.—Evidence.**—A surveyor's record, reciting that the parties were present and consenting to the survey, without naming them, and without disclosing that such parties had consented in writing, or had been duly notified of the survey, is not admissible in evidence to prove the location of certain corners. *p. 100.*

**SAME.—Surveyor's Record.—Notice of Survey.—Presumption.**—Where the record of a county surveyor fails to show that the required notice was given to the owners of land adjoining a line sought to be established, it will not be presumed that notice was given, since it is no part of the surveyor's duty to give such notice. *pp. 100, 101.*

**BOUNDARIES.—Statutory Survey.—Evidence.**—A contract between the owner of land adjoining a line sought to be established and a former owner of the land, which contract mentions the quantity of land such owner was to get, but contains nothing as to the location of the disputed line, is not admissible in evidence to prove the location of such line. *p. 102.*

**SAME.—Statutory Survey.—Evidence.**—A letter to the owner of land adjoining a line sought to be established from a former owner of such land, stating that no private survey would be recognized and warning him to keep off the land until a legal survey should be made, is not admissible in evidence to prove the location of the line in dispute. *p. 102.*

**SAME.—Agreement of Landowners that New Survey be Made.**—An agreement between adjoining landowners that a survey be made does not justify the surveyor in changing a corner or line lawfully established by previous survey. *pp. 102, 103.*

**SAME.—Landowner Does Not Waive Rights Under Previous Survey by a Demand for New Survey.**—A demand for a survey, or the consent of the owner of lands that a survey may be made, is not an admission that the location of a corner or line is uncertain, or that they have been incorrectly located by a previous survey, nor is it a waiver of any right such owner has under a previous survey. *pp. 103, 104.*

From the Newton Circuit Court. *Reversed.*

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*Stuart Bros. & Hammond, E. Grant Hall and J. W. Dyer,*  
for appellant.

*Daniel Fraser and W. H. Isham,* for appellee.

DOWLING, J.—Frank Atkinson and Rachel Atkinson, who were the plaintiffs below, appealed from a statutory survey made by one Gavis to the Benton Circuit Court. The survey appealed from was set aside, and, upon the appointment and order of the court, a second survey was made by one Kolb.

Frank Atkinson and Rachel Atkinson again appealed. The venue of the court was changed to Newton county, and a trial in the Newton Circuit Court resulted in a verdict and judgment against the survey so made by Kolb.

Motions for a new trial and in arrest of judgment were made and overruled, and exceptions were taken to these decisions.

The judgment upon the verdict directed that the Kolb survey be set aside, and that Lewis S. Aster, a competent surveyor, be appointed to make a new survey, and to establish the line between sections twenty-eight and twenty-nine, in township twenty-four north, range seven west, in Benton county. There was also a judgment for costs against Williams. From this judgment Williams appealed to this court, and the errors assigned are the overruling of the motions for a new trial and in arrest of judgment.

Frank Atkinson seems to have no interest in the controversy.

As the motion in arrest of judgment is not discussed in appellant's brief, the objection to the ruling on this motion is waived.

The reasons for a new trial which we consider material, relate to the admission in evidence of a supposed record of what is referred to as the Robertson survey; the exclusion of certain documentary evidence offered by appellant; and the giving of, and refusal to give certain instructions.

By the admission of counsel for appellees, the substantial

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controversy is as to the admissibility in evidence of the so-called Robertson survey.

Upon the trial below, the appellees were permitted to introduce in evidence, over the objection and exception of the appellant, the following writing:

"Wm. T. Rowe.



"The parties present, and consenting to survey and location of corners. James Howeth and Thomas Crawson were sworn as chain-carriers, perpetuated section corner between sections 20-21, 28-29 in town. 24 north, range 7 west, by a post at 'A,' thence located qr. section, or 1-2 mile corner at 'C,' by oak post marked 1-4 s. and also the 1-2 1-4 sec. corner between 'A' 'C,' by oak post marked 1-2 1-4 s. H. Robertson, Co. Surveyor. Surveyed May 14th 1853."

The action of the court in admitting this paper in evidence was erroneous. As the law stood when this survey is alleged, to have been made, ten days' notice of such survey was required as to the resident owners of the adjoining lands, or, if such owners were nonresidents of the county, three weeks' notice by publication in a newspaper nearest to such land, unless all the proprietors of the lands adjoining the corner which the county surveyor was required to establish or perpetuate, and the line which he was required to view and establish, were present and consenting to the survey, or had consented thereto in writing. 1 R. S. 1852, p. 469.

The supposed record of the Robertson survey wholly fails to show that any notice was given, or that all the proprietors of the lands adjoining the corner to be perpetuated and the line to be established were present and consenting to the survey, or that they had so consented in writing. The words, "The *parties* present and consenting to survey and location of corners," do not import that *all the proprietors of the*



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*lands to be affected by such survey* were present and consenting. Who the "*parties*" so alleged to be present were, or whether they were the owners of the lands adjoining the corners to be perpetuated, or the lines to be viewed and established, does not appear. To render the supposed record admissible in evidence, the names of such owners of the adjoining lands as were present should have been set out, or it should have been shown by other evidence that they had been duly notified, had consented in writing to such survey, or were present and consenting to it. Such evidence by parol or in writing would have been competent. This omission in the document offered was not supplied by any kind of proof. If notice was not given to the adjoining landowners, or if they did not consent in writing, or were not present and consenting, the surveyor had no authority to establish or perpetuate a corner, or to view and establish a line, and his proceedings under such circumstances were void. This defect in the supposed record is not obviated by any presumption that the officer did his duty. It was not his duty to notify the proprietors of adjoining lands, to bring them before him, or to obtain their consent to the survey. The cases referred to by counsel for appellees in support of the proposition that, where a public record is silent as to notice, the law will presume that notice was given, relate only to courts of general jurisdiction. Where the court is one of inferior and limited jurisdiction, such as the court of a justice of the peace, no such presumption is indulged, but it must affirmatively appear that notice was given. *Ohio, etc., R. Co. v. Shultz*, 31 Ind. 150; *State v. Gachenheimer*, 30 Ind. 63.

It is said in *Strosser v. City of Fort Wayne*, 100 Ind. 443: "The right to notice is a fundamental one, and it is a rule of wide application, that, in order to take from a citizen any rights, or impose upon him any burdens, notice of some kind must be given him."

This rule applies as well to statutory proceedings where

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notice is required, such as official surveys of lands, as to the proceedings of courts.

The exclusion by the court of the written agreement between appellant and Templeton, the assignee of Cephas Atkinson, a former owner of section twenty-eight, was proper. While the contract mentioned the quantity of land appellant was to get, it afforded no evidence of the true location of the disputed corner or line.

Appellant offered in evidence a letter from Templeton, the assignee of Cephas Atkinson, stating that no private survey made by appellant would be recognized, and warning appellant to keep off of section twenty-nine (then held by Templeton as such assignee) until a legal survey should be made and the corners and lines legally established. The court sustained an objection to this evidence, and, we think, correctly. It proved nothing, and no advantage could inure to appellant from any supposed admissions made in it.

The court of its own motion gave to the jury instructions numbered eleven and twelve, to which appellant excepted. Both of these instructions were based upon the record and documentary evidence of the Robertson survey, which, as we have decided, was improperly admitted. While these instructions might be unobjectionable under some circumstances, as abstract statements of the law, they were not applicable to the facts of this case, and were calculated to mislead the jury. The court having permitted the record of the Robertson survey to be given in evidence, and no proof that the owners of the adjoining lands affected by that survey were present and consenting thereto having been made, except such as was furnished by the recital in that record, these instructions authorized the jury to find from that recital alone, that such owners were present and consenting to the survey. This, we think, was error.

Appellant also complains of instruction numbered two, given by the court at the request of appellees, but the objection is not well taken. The instruction states the law cor-

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rectly. An agreement between landowners that a survey shall be made does not justify the surveyor in changing a corner or line lawfully established by a previous survey.

The rulings of the court in refusing to give instructions numbered one, two, three, and four are called in question. These instructions informed the jury, in substance, that they should not consider the Robertson survey, of which, as we have seen, there was no proof; that the question they were to try was whether the Kolb survey was correct; that the Robertson survey was not conclusive as to the location of the corner in dispute, and, if considered at all, it was to be considered in connection with other evidence in the case; and that the jury were to determine, upon the whole of the evidence, whether the Kolb survey was substantially correct and conformed to the original government survey.

These instructions stated the law correctly, and should have been given.

The last point discussed by appellant's counsel is the legal effect of an agreement, signed by each of the proprietors of lands adjoining the disputed corner and line, substantially as follows:

"For the purpose of establishing the southwest corner and the northwest corner of section twenty-eight (28) and the line dividing said section twenty-eight (28) from section twenty-nine (29), and perpetuating the same, in township twenty-four (24) north, of range seven (7) west, in the county of Benton, and State of Indiana, and for the purpose of saving the expense of publication and service of notice, I hereby waive service as required by statute, and consent that such survey may be had on Thursday, May 9, 1895, and hereby represent that I am the owner of the, etc., etc., in said county and State." [Signed by owner of land described.]

It is contended by counsel for appellant that this paper operates as a waiver of former surveys and is an agreement to disregard them. We put no such construction on it. The sole and only effect of this agreement was to dispense with

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the notice required by the statute. *Wood v. Kuper*, 150 Ind. 622.

Neither a notice by the owner of lands that he will cause an official survey to be made, nor the consent of such owner, in writing or otherwise, that a survey may be made, for the purpose of establishing corners or lines, operates as a waiver or abandonment of any right such owner may have under previous surveys. Such notice or consent does not in any manner or to any extent set aside former surveys or authorize any one to disregard them. A demand for a survey, or the consent of the owner of lands that a survey may be made, is not to be construed as an admission that the location of a corner or line is uncertain, or that such corners or lines have been incorrectly located by any previous survey, or that any corner or line established or located by a former survey is to be set aside.

For the errors of the court in admitting the record of the Robertson survey, and in giving and refusing to give the instructions referred to in this opinion, the judgment is reversed, with instructions to grant a new trial.

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STOERMER v. THE PEOPLES SAVINGS BANK OF THE  
CITY OF EVANSVILLE.

[No. 18,669. Filed January 12, 1899.]

152	104
189	509

**MECHANIC'S LIEN.—Foreclosure of Mortgage.—Expiration of Lien.—**

A mechanic's lien which was foreclosed within one year, as provided by section 7259 Burns 1894, without making a mortgagee of the premises a party, is void as to such mortgagee at the expiration of one year from the time the notice of the intention to hold the lien was filed.

From the Vanderburgh Circuit Court. *Affirmed.*

*William Reister*, for appellant.

*James T. Walker*, for appellee.

**MONKS, C. J.**—In 1890 a mortgage was executed to appellee on certain real estate in Evansville, Indiana, to secure a

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loan made to the mortgagor, which mortgage was duly recorded. Afterwards, in 1894, appellant filed in the office of the recorder of Vanderburgh county, Indiana, a notice of intention to hold a mechanic's lien on the same real estate for work and labor done and performed and for material furnished in the erection of a building on said real estate. Said notice was filed within sixty days after the last item of labor or material was furnished, and said mechanic's lien was in all respects valid. An action was commenced in the court below within one year from the time said notice was filed, and on March 26, 1896, said mechanic's lien was foreclosed, and said real estate ordered sold to pay the same. Appellee was not made a party to said action. On June 24, 1896, appellee commenced this action against the mortgagors to foreclose said mortgage executed in 1890, making appellant and other junior lienholders defendants. Appellant, for answer to appellee's complaint to foreclose said mortgage, set up said mechanic's lien and decree foreclosing the same, alleging that said mechanic's lien was for labor and material furnished in the erection of a building upon said real estate after the execution of said mortgage thereon, and that said mechanic's lien on said building so erected was superior to the lien of appellee's said mortgage thereon, under the provisions of section 7256 Burns 1894. The court below held that the lien of said mortgage was superior to the mechanic's lien on said building, and rendered judgment accordingly.

It is provided in section 7256, *supra*, being section 2 of an act approved March 9, 1889 (Acts 1889, p. 257), that when land is encumbered by a mortgage, and a building is erected thereon, the mechanic's lien on said building is superior to the lien of the mortgage thereon, and the building may be sold to satisfy the mechanic's lien, and removed within ninety days by the purchaser. It is insisted by appellant that under said section the mechanic's lien on the building erected on the real estate described in the mortgage and notice of mechanic's lien was superior to the lien of said mort-

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gage, and that he was entitled to a decree for the sale of said building to pay said mechanic's lien, and that the purchaser under such decree would have the right to remove said building within ninety days.

It is not necessary for us to determine as to the correctness of this contention of appellant, for the reason that, if such right existed, he has not asserted it within the time required by the statute. The laws of this State require that, to enforce a mechanic's lien, the action must be commenced within one year from the time of the filing of the notice in the recorder's office, or, if credit be given, within one year from the expiration of such credit, and if not commenced within the time mentioned the same is null and void. Section 7259 Burns 1894, Acts 1889, p. 258; *Union Nat., etc., Assn. v. Helberg*, post, 139; *Deming-Colborn, etc., Co. v. Union Nat., etc., Assn.*, 151 Ind. 463.

In *Union Nat., etc., Assn. v. Helberg*, supra, an action to foreclose a mechanic's lien had been commenced within the time fixed by statute, and the same foreclosed. Afterwards said real estate was sold on said decree. After the expiration of the time within which the law requires an action to foreclose a mechanic's lien to be commenced, a person holding a mortgage on said real estate which was junior to said mechanic's lien, but who was not made a party to the action to foreclose said mechanic's lien, commenced an action to foreclose the same, and made the purchaser of said real estate, under said decree of foreclosure, a party defendant, and this court held that said mechanic's lien was void, as against said mortgage lien, for the reason that no proceeding had been commenced to enforce said mechanic's lien, as against said mortgage, within the year fixed by statute. *Deming-Colborn, etc., Co. v. Union Nat., etc., Assn.*, supra, is to the same effect. In this case appellant claims that the lien of appellee's mortgage on said building was junior to the mechanic's lien; but it will be observed that appellee, the holder of said mortgage, was not made a party defendant or otherwise, in

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the action to foreclose said mechanic's lien, and that no action was commenced against the appellee to enforce said mechanic's lien within the time required by law. Said mechanic's lien was, therefore, null and void, as against appellee's mortgage, under the law as declared in the cases above cited.

Other reasons are urged to sustain the action of the trial court, but, having reached the conclusion that the mechanic's lien is null and void as against said mortgagee, it is not necessary that they be considered. Finding no error in the record, the judgment is affirmed.

COPELAND v. THE TOWN OF SHERIDAN.

[No. 18,848. Filed Oct. 25, 1898. Rehearing denied Jan. 12, 1899.]

**STATUTES.—Amendment.—Act of 1885.—Intoxicating Liquors.—License.—Towns.**—The act of April 10, 1885 (Acts 1885, p. 171), for the incorporation of towns, authorizing the trustees thereof to license the sale of intoxicating liquors, is void, since it is an amendment of the act of March 1, 1877, held by the Supreme Court to be invalid. p. 109.

**INTOXICATING LIQUORS.—License by Town.**—By the act of March 31, 1879 (Acts 1879, p. 201), the seventh clause of the act of 1853 was amended so as to authorize town trustees to license the sale of vinous, malt, and other intoxicating liquors, charging a license fee not to exceed the amount required by the statutes of the State to sell or retail intoxicating liquors; the sum then required by the State for a license to sell spirituous, vinous, and malt liquors, was \$100; and for a license to sell vinous and malt liquors only, \$50. Held, that construing said laws together a town had the right to issue a license to sell intoxicating liquors generally, and charge a license fee of \$100. pp. 110, 111.

From the Hamilton Circuit Court. *Affirmed.*

*Edenharter & Mull*, for appellant.

*Gavin, Coffin & Davis*, for appellee.

HOWARD, J.—Appellant was convicted of having, within the corporate limits of the town of Sheridan, sold intoxicating liquors in a quantity not less than a quart, to wit: two quarts of beer, to be then and there drunk as a beverage,

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without having a license so to do, contrary to the provisions of an ordinance of said town, passed June 15, 1896.

The ordinance in question provided for a license fee of \$100. It is contended that the town had no authority to pass such an ordinance, and that, even if it had such authority, it could not pass an ordinance which should exact more than \$50 as a license fee for selling vinous and malt liquors.

It is conceded that whatever power, if any, the town had to pass the ordinance in question, if not conferred by some original act of legislation, must be derived from the seventh clause of section 22 of the act of 1852 for the incorporation of towns, as the same has since been amended. The power of the town, as originally given in that clause, was, "To license, regulate, or restrain auction establishments, traveling peddlers, and public exhibitions within the corporation." 1 G. & H. 619, 1 R. S. 1852, p. 482. This of course, gave no power to license the sale of intoxicating liquors.

By an act approved March 2, 1855, an attempt was made to amend section 22 of the act of 1852, *supra*, by adding to the original sixteen clauses three additional ones, but, setting out only the new clauses, the seventeenth, eighteenth and nineteenth (Acts 1855, p. 128, 1 Davis R. S., p. 878, at 880, 1 G. & H., at p. 625); but the amendatory act was held void for failure to set out the full section as amended. *Cowley v. Town of Rushville*, 60 Ind. 327.

A like failure resulted from the attempt made by an act of March 11, 1867, to amend the seventh clause of said section—the clause here under consideration—the legislature having again failed to set out the whole section as amended. Acts 1867, p. 220, 3 Davis R. S., p. 121; *Town of Martinsville v. Frieze*, 33 Ind. 507.

By an act approved March 1, 1877, a third attempt was made to amend said section, this time also with the intent to reach clause seventh and authorize towns to license the sale of intoxicating liquors. Acts 1877, Reg. Sess., p. 144, sec-



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tion 3333, R. S. 1881. But the effort again failed for the reason that the legislature attempted to secure the object in view by amending the void act of March 2, 1855, *supra*. *Carr v. Town of Fowler*, 74 Ind. 590.

A fourth effort to amend the section was made by an act approved April 10, 1885. Acts 1885, p. 171, section 4357 Burns 1894, section 3333 Horner 1897, section 4462 Thornton 1897. This last act seems to have been regarded by the court below, as it evidently was also by all the late compilers of our statutes, as a valid law. It appears, however, on examination, that the act was but an amendment of the void act of March 1, 1877, *supra*. It must consequently be also void, since, "a valid law cannot be enacted by amending an invalid and void law." *Cowley v. Town of Rushville*, 60 Ind. 327.

By an act approved March 6, 1897, however, (Acts 1897, page 176, section 3333a, Horner 1897), it is admitted that the legislature has finally, by an independent statute, given to towns the power to license by ordinance the sale of intoxicating liquors. Still, although the act of 1897 may apply to all future cases, yet, as the ordinance before us was passed June 15, 1896, it is plain that this last act can have no effect in the case at bar.

But counsel for appellee cite us to an act approved March 31, 1879 (Acts 1879, p. 201), which, though overlooked by the compilers of the revision of 1881, and by all subsequent compilers of the statutes, and even by this court—in *Clevenger v. Town of Rushville*, 90 Ind. 258, where, by oversight, the void act of 1877, *supra*, was relied on—seems, nevertheless, to be a valid amendment of section 22 of the original act of 1852, and to have fully authorized the passage of the ordinance in question. The act was recognized as valid in *McKinney v. Town of Salem*, 77 Ind. 213.

The seventh clause of section 22 of the act of 1852, as so amended by the act of 1879, gives power to the trustees of towns, "To license, regulate, or restrain auction establishments, street auctions, and all tables, alleys, machines, de-

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vices, and places for sports or games, kept for hire or pay, traveling peddlers, public exhibitions, and the sale of spirituous, vinous, malt, and other intoxicating liquors. A sum not exceeding the amount required by the statutes of the state for license to sell or retail intoxicating liquors, may be required to be paid into the treasury of the corporation by the person so licensed before receiving such license."

While counsel for appellant, in their reply brief, candidly admit the validity of this act, and that it gave to the trustees of the appellee town power to pass an ordinance for licensing the sale of intoxicating liquors; yet they say that the ordinance is invalid for the reason that it required the appellant to pay a license fee of \$100, whereas the statute last cited, and under which the ordinance, if valid, must have been passed, limited the license fee to be charged to "a sum not exceeding the amount required by the statutes of the State for a license to sell or retail intoxicating liquors," which sum then required by the State was, for a license to sell spirituous, vinous, and malt liquors, \$100, and for a license to sell vinous, and malt liquors only, \$50. Acts 1875, p. 55, section 5316 R. S. 1881, section 7281 Burns 1894. In other words, the contention is that, under the statutes then in force, appellant could not, in order to be permitted to sell beer, known by the court to be a malt liquor, be required to pay a license fee of more than \$50, and could not, consequently, be fined for violating an ordinance which exacted a license fee of \$100.

We do not think the limitation here sought to be placed upon the power of the town to exact a fee up to the sum of \$100 "for license to sell or retail intoxicating liquors" can be established or maintained. The town might, perhaps, have issued a license "to sell only vinous or malt liquors, or both, in quantities less than a quart at a time", as provided in the act of 1875, *supra*, and if it did so, possibly, under the act, could demand a fee of but \$50. The town, however, was not required to issue such a license, but might, as it did,

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issue only a license "to sell spirituous, vinous, malt, or other intoxicating liquors in any quantity not less than a quart at a time." For such a license, to sell "intoxicating liquors" generally, even though not in quantities less than a quart at a time, it is evident, construing the acts of 1875 and 1879, *supra*, together, that the only limitation upon the fee to be charged is \$100, that being the amount then "required by the statutes of the State for license to sell or retail intoxicating liquors."

The town was under no obligation, by the statutes then in force, to issue one license for selling spirituous, vinous, and malt liquors, and another to sell vinous and malt liquors alone. The only requirement was that the corporation should not exact a license fee "to sell or retail intoxicating liquors" greater than the fee exacted by the State. This the town, by its ordinance, did not attempt to do; and consequently no invalidity is shown in the ordinance.

Judgment affirmed.

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BRUNSON, ADM., v. MARTIN ET AL., EXECUTORS.

[No. 18,607. Filed January 18, 1899.]

**WILLS.—Construction.—Use of Income of Estate for Life.—Residuum.**

—Testator bequeathed to his wife the use of all his property both real and personal for and during her lifetime, with a provision that "she shall use but the rents and profits of said estate, or so much thereof as she can make profitable use of." In a further provision of the will the testator enjoined upon his executors the duty "to assist her and attend to all her business if she so desired." *Held*, that the will gave the widow only a right or power to use the income, and, upon her failure to avail herself of that right, the rents and profits remaining with the executors at her death went to testator's residuary legatees.

From the Jay Circuit Court. *Affirmed*.

W. H. Williamson, J. W. Thompson and S. A. D. Whipple, for appellant.

S. W. Haynes, G. W. Hall and J. J. M. La Follette, for appellees.

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JORDAN, J.—Appellant, as the administrator of Margaret Stoltz, instituted this proceeding by a petition in the lower court, making the appellees, Martin and Stoltz, executors of the last will and testament of George Stoltz, deceased, and certain legatees under said will, parties defendant to the action. By his petition, appellant sought to secure an order of the court directing the executors of George Stoltz to pay over to him, as administrator of Margaret Stoltz, deceased, \$8,000 which they had in their hands at the date of said Margaret's death. A demurrer for insufficiency of facts was sustained by the court to this petition, and a final judgment rendered thereon against appellant, from which he prosecutes this appeal.

The facts set out in the petition may be thus summarized: Appellant is the administrator of the estate of Margaret Stoltz, who died intestate in 1896, leaving surviving her no children, but leaving as her heirs certain other numerous persons mentioned in the petition. The appellees, Frederick Martin and Daniel Stoltz, are the executors of the last will of George Stoltz, who died in 1891, leaving no children, but leaving as his widow said Margaret Stoltz, and also leaving surviving him certain brothers and sisters, and other persons related to him by consanguinity. In 1889 he executed the will in controversy, and the parts thereof material to the question mooted in this case are the following:

"Item 1. I give and bequeath to my beloved wife, Margaret Stoltz, the use of all my real and personal property during her lifetime, that she may use it in any manner she knew me to use it, also for religious and charitable uses, and my executors shall assist her and attend to all her business if she shall so request. She shall use but the rents and profits of said estate, or so much thereof as she can make profitable use of."

"Item 2. I give and devise the farm on which we now live, containing ninety and seventy-five one-hundredths (90 75-100) acres, and situated in Wabash township, in Jay

county, Indiana, to Louis P. Fenning and Mary A. Fenning, his wife, and her heirs, subject to the life estate of my said wife, Margaret, as set out above, and subject to the payment by said Louis P. and Mary A. Fenning to Caroline Martin (or her heirs), wife of George Martin, fifteen hundred (\$1,500) dollars, and to Adam Stoltz, my brother, or his heirs, fifteen hundred (\$1,500) dollars. Five hundred dollars shall be paid to each of them one year after the death of my said wife, or, should I survive her, one year after my death, without interest, and five hundred dollars to each of them at the end of each year, with 6 per cent. interest, until all is paid."

By item three the testator bequeathed to his sister certain property, as therein mentioned, and by items four, five, six, and seven he devised certain other property and money to other legatees, who apparently were the relatives of his said wife, Margaret. By item eight he gave \$10 to his brother, Philip Stoltz.

Items nine and ten of the will are as follows:

"Item 9. The residue of my estate, after the payment of all debts and funeral expenses, I give and bequeath to my sisters, Caroline Martin and Margaret Mueller, and to my brother, Adam Stoltz, or their heirs.

"Item 10. I hereby appoint as executors of the foregoing will Frederick Martin and Daniel Stoltz with the hope and request that they will attend to the wants of my wife while she lives, should she survive me, and be faithful in carrying out all they know to be my will, for which they shall be paid a fair recompense here and approving conscience toward God."

Appellant's decedent, Margaret Stoltz, elected to accept the provisions made for her in her husband's will in lieu of her rights in his property under the law. This will was duly probated in August, 1891, in the Jay Circuit Court, and appellees, Martin and Stoltz, were duly qualified as executors

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and took upon themselves the discharge of the duties of said trust and at the commencement of this action were still acting in the discharge of such duties.

The petition alleges that the personal property of the testator, George Stoltz, which came into the hands of his executors, consisted, in part, of horses, cattle, sheep, wagons, and farm implements, wheat, corn, and other cereals, of the value of \$2,000, and also consisted, in part, of accounts, notes, bills, and choses in action, of the value of \$10,000, said personal estate as an entirety aggregating \$12,000. Personal chattels above mentioned, other than the notes, bills, and accounts, were sold by the executors at public sale, and the money arising therefrom, together with that arising out of the interest, on notes, bills, and accounts, was received by the executors, and by the latter was loaned and reinvested, and by their management of the said estate, in this manner, there was created or arose by way of interest, rents, and profits, from the property, between the death of the testator and the demise of his said wife, a fund amounting to \$8,000, which remained unused in their hands at the date of Margaret Stoltz's death, which fund, when combined with the corpus of the personal estate, amounted to \$20,000, remaining in the hands of these executors at the death of the said widow.

No part of this income of \$8,000, accruing as aforesaid, was paid over to the said Margaret Stoltz, or accounted for to her by the said executors; neither does it appear that she, at any time during her life subsequent to the death of her husband, exercised the power, under his will, to use any part of said income as it accrued, or made any demand or claim whatever upon said executors that they pay over to her or account to her for any portion thereof. Neither does it appear, from any of the facts set out in the petition, that the said Margaret contracted any debts upon the faith that the said income so accrued should be applied in payment thereof; and, for aught appearing to the contrary, she at no time ex-

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exercised any power or right to receive the said money so accrued from the said executors for her use, or that she required any part thereof as necessary for her support and maintenance during her life; and, for anything appearing to the contrary, the only purpose for which appellant, as her administrator, is seeking to secure the payment of the money to him by the executors of George Stoltz is that it may be distributed through him as a medium to the numerous heirs of his decedent, none of whom are shown to be of any blood relation to the said testator.

Appellant averred in his complaint that when he inventoried the property belonging to the estate of his decedent, Margaret Stoltz, he omitted from said inventory the money or fund now in controversy, for the reason that at that time he had no knowledge of the facts, but that prior to instituting this action he demanded that appellees, as executors, pay over to him the said fund or money, for which he now sues, and that they account to him, under the will of the said testator, for the amount due to the estate of his decedent, all of which, it is alleged, they refused to do. The claim of counsel for appellant is that, under the will in question, Mrs. Stoltz, widow of the testator, was given an absolute life estate in all of his property and that she was entitled to all of the rents, profits, and income that arose out of the real and personal property, after the death of her husband until her death, whether she actually received it or not, and that any amount not claimed or turned over to her by said executors prior to her death must be paid by them to appellant, as her administrator, and pass into and become a part of her estate.

Upon the other hand, counsel for appellees contend that, inasmuch as Mrs. Stoltz failed in any manner to avail herself of the power to use the income accruing from the money at interest and from the rents and profits of the estate given her under her husband's will, therefore, the part not used or claimed by her during her life which remained in the hands

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of the appellees, as the executors of the will of George Stoltz, belongs to his estate and passes to his residuary legatees.

The question propounded for our decision, under the facts and the will set out in the petition, is, what rights did the testator intend to confer upon his wife under the provisions of his will?

It is apparent, we think, that the draftsman who prepared the will in controversy was not skilled in the drafting of such instruments, and perhaps it may be said he employed, in some respects, inapt words, in expressing the meaning of the testator. The question, therefore, involved in this appeal depends upon the interpretation of the will of George Stoltz. In the construction of a will, courts seek to ascertain the intention of the testator, as this is the guiding rule or canon of interpretation affirmed by the authorities from Blackstone down to the present time. As the authorities sometimes state it, "The intention of the testator is the pole star," and, in a judicial search to ascertain this intention, courts will look to and consider the entire instrument, and isolated facts and clauses of the testament will not be selected, and their meaning determined, without considering them in connection with other parts of the will. Neither will such isolated parts or clauses be permitted to control the general tenor of the instrument in regard to the testator's intention. Unless some principle of public policy or some unyielding legal rule interferes, the intention of the testator, when ascertained, must be observed and enforced by the court. It is also a canon of construction relative to wills that the court, when necessary, may also, in addition to considering the provisions of the will itself, look to and consider the circumstances under which it was executed both in respect to the condition of the testator and also that of his property and family, and the court will endeavor, under such circumstances, as far as possible, to put itself in his position. *Eubank v. Smiley*, 130 Ind. 393; *Nading v. Elliott*, 137 Ind. 261; *Bullerdict v. Wright*, 148 Ind. 477.



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As the facts disclose in the case at bar, neither George Stoltz, the testator, nor his wife, had any children. He seems to have had several brothers and sisters whom he made legatees under his will. His wife also, as revealed by the complaint, had numerous relatives of her own blood and some of these, by the provisions of the will, were made the objects of her husband's bounty. After declaring what the several legatees mentioned were to receive, the testator provided, by item nine of his will, that, after the payment of all debts and claims against his estate, his two sisters, Mrs. Mueller and Mrs. Martin, and his brother, Adam Stoltz, were to be the beneficiaries of the residuum of his estate.

By the first item of his will, the testator gave to his wife, Margaret Stoltz, the right to use all of his real and personal property during her life in like manner as she knew him to use it, including religious and charitable purposes. The testator, however, declares at the close of item one, in emphatic language, that "*she shall use but the rents and profits of said estate or so much thereof as she can make profitable use of.*" (Our italics.) He also, in the same item, enjoins upon his executors on the request of his wife to assist her and attend to all of her business. By item two, he devised the home farm to Fenning and wife, subject to the life estate of his wife "as above set out," and provided therein, in effect, that these devisees, who appear to have been occupying the home farm at the time the will was executed, should continue to occupy it upon the same terms that they then did for the purpose of keeping his wife, in the event she survived him, and for the payment of taxes accruing against the premises. Or, in other words, the Fennings, after the death of the testator, and during the life of his wife, were to continue in the use and occupation of the home farm in consideration that they kept Mrs. Stoltz and paid the taxes upon the farm.

In item ten, he expresses the hope and requests that his executors will attend to the wants of his wife during her life, and that they be faithful in carrying out all which they know

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to be his will. The desire of George Stoltz, the testator, to provide fully for the needs of his wife, in the event she survived him, is clearly and strongly evinced by the provisions of his will, and that he intended that she should be liberally supplied with all that might be necessary for her wants and comfort during her life, there can be no doubt. By item one of the will it is evident that the testator only intended to bequeath to his wife the right to the use of his real and personal property for life, and that he desired that she use it in the manner he had, including donations in the furtherance of religious and charitable purposes. To define his meaning more particularly, or express himself, in regard to the right or power which he intended to confer upon his wife, under his will, he declares, in effect, and in unmistakable terms, that "she shall use but the rents and profits of said estate" or in other words, so much of such income as she can profitably use. The word "use," as employed in this will, is of potential significance, and must be given its full force and effect.

As a general rule, the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. See Anderson's Dictionary of Law, p. 1069. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy or cultivation, etc., or the rent which can be obtained for its use. If it is money or its equivalent, generally speaking, it is the interest which it will earn. As we have heretofore said, in the interpretation of the will in question, it is the intention of the testator, and his alone, which we are required to seek. A will, in its construction, is not open to the same rule which applies to mutual contracts from which both parties expect to derive some benefit. In such a case the court seeks to ascertain the intention of both parties to the contract, and anything which it can be said that either party did not agree to cannot be considered within the intention. Not so, however, with a will, for it is but the act of the testator, and he alone fixes the terms and conditions to please himself, while those

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who are the objects of his bounty simply accept or reject that which is bestowed upon them.

Manifestly, when the provisions and terms embraced in item one are construed together as a whole, it is disclosed that the intention of the testator was to restrict the right of his wife to the use during her life of so much of the income of his estate accruing after his death as she could put to a profitable use or purpose; the adjective "profitable" no doubt being employed in the sense of "beneficial" or "advantageous," the testator possibly intending to be understood thereby that his wife should have the right to use so much of the income of his estate as she could, for her own benefit, and in the furtherance of religious and charitable purposes. We cannot ignore the words, "Give and bequeath to my beloved wife \* \* \* the use of all of my real and personal property during her lifetime," and the further provision, in the same connection, that, "she shall use but the rents and profits of said estate, or so much thereof as she can profitably use." By this language and expression the testator certainly intended that his wife should have, not an absolute estate in the income, but only the use of so much thereof during her life in the manner provided. *Goudie v. Johnston*, 109 Ind. 427.

The executors of the will of George Stoltz were directed therein to assist his wife and attend to all her business and wants while she lived. If they, as his executors, were to attend to the business and wants of his wife during her life, he evidently intended that their trust should at least continue until her death, and that they, as such executors, should have the management except as it may be said to have otherwise been impliedly directed in the will of the corpus of his estate from which the income for the use of his wife was to be derived. The gift to the wife, under the will, was not absolutely of the income in question, but it was the gift of the right or power, if she desired to exercise it, to use during her life the income arising out of the property mentioned or set apart by the testator for that purpose, and it is clear that,

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like any other power, it must be exercised by her prior to her death, in order to vest absolutely in her such property rights in the income as would pass to her estate at her death. Therefore, appellant, as her administrator, under the circumstances, does not occupy the position of his decedent, were the controversy to the fund in dispute between the latter and the executors of her husband's will.

It may be said, however, we think, that the question as to the extent to which Mrs. Stoltz might have exercised the power so conferred upon her, in respect to the amount of the income that she would use, was a matter left by her husband, under his will, largely to her own discretion to be exercised within the spirit or intent of the bequest, assisted by his executors in the event she saw proper to invoke their aid. If she had exercised the right which the will gave her during her life to use this income, as it accumulated in the hands of the executors of her husband's estate, and had invested it in other property or reduced it to her possession or control, prior to her death, for the purpose of using it, a different question would be presented; but the facts do not reveal that she ever exercised, or attempted in any manner to exercise, the power which the will gave her to use the money constituting the income or fund in question, nor is she shown ever to have made any demand for its use, nor does it appear that prior to her death she contracted any debts in reference thereto. She seems to have been satisfied in not exercising her right, and apparently was contented to leave the income to accumulate, unused by her, in the hands of the executors of her husband's will. The right or power to the use of this fund she certainly was required, under the circumstances, to exercise during her life, and, as she failed to do so, prior to her death, and there being no facts shown in the petition that would entitle her administrator to exercise it after her death, the demand of the appellant must fail. *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. 847; *Nading v. Elliott*, 137 Ind. 261.

It cannot be successfully asserted that there is anything in

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the will or in the circumstances surrounding the testator at the time of its execution, so far as the same are disclosed, which indicate that he intended that the income arising from his estate, remaining unused or unclaimed by his wife in the hands of his executors at her death, should be turned over by them to her administrator, and thereby pass into her estate for the benefit of her heirs, to the exclusion of his brothers and sisters, kin of his own blood, whom he had made his residuary legatees. Appellant's decedent, therefore, having failed to exercise in any manner her right to the fund in controversy, during her life, but leaving it, as she did, unused and unclaimed in the hands of the executors of her husband's will, it must be considered and held to be a part of his estate, and, after the payment therefrom of all debts and claims against said estate, the remainder thereof must be distributed to the residuary legatees, as provided by his will. *Holbrook v. McCleary*, 79 Ind. 167; *Heilman v. Heilman*, 129 Ind. 59.

It follows that appellant, under the facts set out in his petition, is not entitled to have the money in question paid over to him by the appellees for the benefit of his decedent's estate, and the court therefore did not err in sustaining the demurrer.

Judgment affirmed.

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CULBERTSON ET AL. v. KNIGHT ET AL.

[No. 18,262. Filed January 24, 1899.]

**DRAINS.—Construction.—Assessment of Benefits.**—Under the provisions of sections 4285 and 4288, R. S. 1881, authorizing the construction of drains when the same shall be conducive to the public health, convenience, or welfare, or when the same will be of public benefit or utility, and authorizing the assessment of lands with benefits for the construction thereof, whether the drain passes through the lands assessed or not, whatever will come to the land from the construction of the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general

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market, should be reckoned as benefits, whether the drain actually reaches the land and receives the water directly from it or not. pp. 123, 124.

**DRAINS.—Assessments of Benefits.**—Where the owner of an upper estate collects surface water into a body by a system of artificial drainage, or even cuts a channel that will enable the water to flow more rapidly or in a larger volume upon lower lands, benefits may be assessed to the upper lands for the construction of a drain upon the lower lands which provides means of escape for such water. pp. 124, 125.

**SAME.—Assessment of Benefits.**—In assessing benefits to lands for the construction of a drain to carry off water discharged from such lands by artificial drains, the viewers may take into consideration that the upper landowners are liable to be enjoined by the owners of the lower lands from discharging waters collected by them by such drains. pp. 125, 126.

From the DeKalb Circuit Court. *Affirmed.*

*James E. Rose and James H. Rose, for appellants.*

*E. D. Hartman, for appellees.*

**HADLEY, J.**—This action was commenced by the appellees filing in the commissioners' court, a petition asking for the location of a public drain, under section 5656 Burns 1894, section 4286 Horner 1897. Viewers were appointed who made report, establishing the drain and assessing the lands which in their opinion would be benefited thereby, and among others assessed benefits to the lands of appellants. To this report of the viewers, appellants filed a remonstrance, under section 5665 Burns 1894, section 4295 Horner 1897, upon the grounds: (1) That their respective assessments were too high, and, (2), the assessments of others were too low, and, upon their request, reviewers were appointed who made report that "we find that the action of the viewers was just and correct, and we sustain and approve the action of the viewers and their report."

Thereupon the commissioners approved the report of the viewers and entered an order establishing the drain. From the decision of the board of commissioners establishing the drain the remonstrators appealed to the DeKalb Circuit

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Court. The case was there tried, and upon request, the court found the facts specially and stated conclusions of law in favor of the petitioners and, overruling appellants' motion for a new trial, rendered judgment thereon, establishing said drain as located by the viewers, and confirming assessments as made and remanding the same to the board of commissioners for construction in the manner, and of the dimensions, prescribed in the report of the viewers. From the judgment an appeal is taken to this court.

The only error assigned and discussed is the overruling of appellants' motion for a new trial and the only question presented by the motion, and appellants' brief, is the sufficiency of the evidence to support the judgment. As stated by appellants, the question is, "whether or not the lands of the remonstrators will be benefited by the construction of the drain?"

The record discloses that the proposed drain commences at the junction of two other drains, known as the Leighty and Baker drains, at a point one and three-fourths miles east of the west line of Concord township, and that the water-shed, at the west line of Concord township, is twenty and forty-three-hundredths feet higher than at the point of commencement; and the assessments complained of here are laid upon the highlands of the water-shed, drained along the lines of the present Leighty and Baker drains, and continuing over the lines of the proposed drain through a natural water course known as Bear creek, to the St. Joseph river.

The appellants' contention is that their lands are sufficiently drained by artificial ditches already in successful operation—that they cannot reach the proposed drain without crossing the lands of others, and, hence, are not benefited by its construction. The statute under which the proceeding is had cannot be brought within the narrow limits contended for by appellants, for it is apparent, from the act itself, that the legislature had in view something more than an increase in the productiveness of wet lands. The first section of the

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act recites that boards of commissioners may cause the construction of drains when the same shall be conducive to the public health, convenience, or welfare, or when the same will be of public benefit or utility. Section 5655 Burns 1894. And section 5658 provides that all lands, benefited by a public ditch, shall be assessed in proportion to the benefits for the construction thereof whether it passes through the lands or not. Public health, public convenience and public utility are fundamental considerations, and these, with all other subjects that affect the value of land, must be counted upon by the viewers in determining the question of benefits. A rule that has received high sanction is stated thus, "The only safe and practical course, the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property." *Matter of William & Anthony Streets*, 19 Wend. 678; *Cooley on Tax.*, 860; *State v. Mayor, etc.*, 35 N. J. L. 157, 166; *Lipes v. Hand*, 104 Ind. 503.

Whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, should be reckoned as benefits, and these questions arise without reference to whether the drain actually reaches the land and receives the water directly from it. Indeed it is provided by section 5658, *supra*, that the viewers shall regard accruing benefits whether the drain passes through the land or not in so far as it affords an outlet for the drainage of the land.

The position of appellants, that their lands, being sufficiently high above the proposed drain to enable them successfully to discharge upon lower lands, the water falling and coming upon their grounds, and that consequently they can receive no benefits from the construction of the proposed ditch, cannot be sustained.

A fact found by the court and not challenged is as follows: "That the lands of the petitioners are frequently overflowed and injured by water that comes upon them through ditches



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that drain the water from the lands of the other persons, parties hereto, and affected by said ditch." The owner of an upper estate has no right to collect the water falling upon his land into a ditch and hurl it in a flood upon his neighbor below. The owner of the superior land may suffer the water that falls upon his fields to find its natural way off, even to the descent upon his neighbor to his injury, but, when he collects it into a body by a system of artificial drainage, or even cuts a channel that will enable the water to pass away more rapidly, or in larger volume, then the law requires him to look beyond his own line and make provision for the abnormal body of water he has created. He may not thus injure his neighbor by an increased volume of water and avoid the burden of providing for increased means of escape. *Templeton v. Voshloe*, 72 Ind. 134; *Weddell v. Hapner*, 124 Ind. 315; *Weis v. City of Madison*, 75 Ind. 241; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325.

It was not only the right but the duty of the viewers in their examination of the premises to regard these things, and if they found the fact to be, as stated by the court, that the lower lands were frequently overflowed and injured, by water that comes upon them *through ditches* that drain the water from the higher lands, to adjudge benefits to such upper lands by the creation or enlargement of a channel sufficient to avoid such overflowing and injury. Appellants' position, that the viewers could only look at conditions as they existed at the time, is unsound. They could consider that the owners of intervening lands had the right to fight "the common enemy," and upon their own premises even to raise embankments to ward off the water coming upon them by natural surface drainage other than by natural, or prescriptive water courses, and thus heap up the surface water upon the appellants' land without relief to them except through our drainage laws. *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; *Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511.

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The viewers could further consider, that appellants were constantly liable to be enjoined by the owners of the lower lands from discharging their collected water upon their properties, and, in determining the question of benefits, they could count upon conditions that lawfully existed, or could so exist. The burden of proof, that their lands were not benefited by the proposed drain, rests upon the appellants (remonstrators). *Wilson v. Talley*, 144 Ind. 74.

Three disinterested freeholders and householders, not of kin to any party interested, after actual view of the premises, determined the several amounts of benefits assessed against the appellants' lands. The amounts assessed were small. Three reviewers, of like qualifications, reexamined the lands, revised the several assessments, and found them all "just and correct" as stated by the viewers. The circuit court heard the testimony of the viewers and many other witnesses, *pro* and *con*, and, having weighed the evidence, confirmed the assessments of benefits as they had been made by the viewers, with two unimportant exceptions, and under the rule many times announced, this court will not disturb the finding.

Judgment affirmed.

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WHITE ET AL. v. FATOUT ET AL.

[No. 18,321. Filed January 24, 1899.]

**APPEAL AND ERROR.**—*Demurrer.*—*Record.*—Alleged error in sustaining a demurrer to a complaint cannot be reviewed on appeal where the complaint is not in the record.

From the Marion Superior Court. *Affirmed.*

*F. E. Gavin, C. F. Coffin and T. P. Davis*, for appellants.

*A. C. Ayers, A. Q. Jones and J. E. Hollett*, for appellees.

**JORDAN, J.**—This action was commenced in the lower court by appellants to recover damages in the sum of \$5,000 upon an alleged breach of a contractor's bond. The original complaint was filed on the 4th day of June, 1895, but

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this pleading does not appear in the record. On September 18, 1895, appellees filed a demurrer to the original complaint, which demurrer, as the record discloses, was sustained on November 9, 1895. The cause thereafter seems to have been continued from time to time in court until June 24, 1896, when judgment was rendered against appellants on demurrer. On July 1, 1896, as the record shows, appellants filed an amended complaint. This is the only one set out in the record. No demurrer appears to have been filed to this complaint. The only error assigned in this appeal is that the court erred in sustaining the demurrer to the complaint. As the complaint to which the demurrer was sustained, and to which the assignment of errors applies, is not in the record, this court is certainly not in a position to review the action of the lower court in sustaining the demurrer thereto, and all we can do is to affirm the judgment. Judgment affirmed.

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[No. 18,862. Filed Oct. 5, 1898. Rehearing denied Jan. 24, 1899.]

**CONTRACTS.—Execution Without Reading.**—It is a general rule that one who executes a written instrument without reading it will not be relieved of the consequences of his want of care. *p. 130.*

**SAME.—Execution Without Reading.—Fraud.**—One who, by known trust and confidence reposed in another, relies, and has good cause to rely, upon representations made by such other party, and is thereby induced to execute an instrument for the benefit of such other person, and in the belief that he is executing another and different instrument, may be relieved as against such wrong, in case no innocent third parties are thereby injured. *pp. 132, 133.*

**DEED.—Execution Without Reading.—When Set Aside for Fraud** -- Where a stepson at the request of his stepfather signed a deed without reading, believing, as was represented by such stepfather, that he was signing a mortgage which he had just read, such deed will be set aside for fraud. *pp. 130-133.*

**SAME.—Action to Set Aside for Fraud.—Evidence.**—In an action by a stepson to set aside a deed alleged to have been procured by his stepfather by fraudulently representing at the time of its execution that it was a mortgage, where it is claimed by plaintiff that he did not know the real nature of the instrument for two months after its

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execution, the testimony of a witness that she had afterwards informed plaintiff of the true character of the instrument he had signed, is admissible as corroborating the evidence of plaintiff that he did not know the instrument was a deed when he signed it. *p. 133.*

**DEED.**—*Action to Set Aside for Fraud.—Evidence.*—Where a husband and wife join in a deed to the husband's stepfather, believing, as represented by such stepfather, that they were executing a mortgage, and an action is afterwards brought to set aside the deed, the evidence of the wife that she had reposed great trust and confidence in her husband's stepfather was admissible. *p. 133.*

**SAME.**—*Action to Set Aside for Fraud.—When Fraud May be Proved by Preponderance of Evidence.*—In an action to set aside a deed alleged to have been procured by the fraud of one in whom the grantors properly reposed trust and confidence, the fraud may be established by a preponderance of the evidence; the rule that the evidence, in order to prevail against a deed regular in form and duly executed, must satisfy the court beyond a reasonable doubt that the execution of the deed was procured through the fraud of the grantee not being applicable. *pp. 134, 135.*

From the Vigo Superior Court. *Affirmed.*

*J. F. Carson, C. N. Thompson, J. G. McNutt and F. A. McNutt*, for appellant.

*Frank Carmack, S. R. Hamill and F. S. Rowley*, for appellees.

HOWARD, J.—This was an action brought by appellees to set aside as fraudulent a deed made by them to appellant. Appellees allege in their amended complaint that they are husband and wife; that the appellant is stepfather of the appellee Wesley; that the said Wesley is the only child of Jennie Givan, deceased, who died the wife of appellant, and seized in fee simple of the real estate in controversy, being certain lands in the city of Terre Haute; that the said Jennie Givan left as her only heirs at law the appellant, her husband, and the appellee Wesley, her son; that the said Jennie Givan and appellant intermarried in 1872, when Wesley was seven years of age, and that he lived with his mother and stepfather and grew to manhood as a member of the family, and the relation of father and son always existed between him and

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the appellant; that appellees reside in the city of Indianapolis, and on or about October 3, 1894, the appellant called upon them at their home and expressed his desire to make a loan for \$500 upon the land in controversy, to enable him to engage in some business; that appellee Wesley, desiring to assist appellant because of their relationship, assented to the encumbering of said real estate, as requested, and procured the assent of his wife and co-appellee to join in the mortgage; that on this visit appellant exhibited to appellees an instrument purporting to be a mortgage upon said property for \$500, which instrument appellees then read and agreed to sign; that on the occasion appellant took dinner with appellees, and it was at the dinner hour that the conversation and understanding as to the execution of the mortgage took place; that immediately after dinner appellees met appellant at a notary's office in the city of Indianapolis, where appellant handed to the notary an instrument, to all appearance the mortgage that appellees had just read at their house and agreed to sign; that upon the instrument being handed to the notary he remarked to appellees, "I suppose you understand the nature of this," and upon their assenting he indicated to them the place for their signatures and thereupon they signed and acknowledged the instrument; that during this proceeding appellant stood by and heard the words of the notary and witnessed the conduct of appellees without saying a word; that appellees signed the instrument believing it to be the mortgage which appellant had exhibited to them at their home and which they had agreed to sign; that they signed the same without any consideration whatever, but simply as a favor and accommodation to appellant; that after having read the instrument which appellant asked them to sign, the instrument which they did sign was exhibited to them by the appellant as the same instrument which they had just read at their house; that instead of the instrument thus executed by them being the mortgage which they had just read, it was

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a quitclaim deed which appellant had procured to be prepared without their knowledge or consent, and by the trick and fraudulent conduct of appellant herein set out, he presented it to them and had them execute it in the manner aforesaid, well knowing at the time that appellees, by reason of his conduct, were misled into signing the instrument, believing it to be the mortgage which he had shown them at their house, well knowing that they would not have executed a deed to their interest in the premises, and knowing that appellees were willing to join in the mortgage only, as he requested, because they reposed in him the confidence shown by a child toward a parent; that for the purpose of misleading, deceiving, and defrauding appellees, appellant procured the quitclaim deed to be prepared without their knowledge, and by his misleading conduct, as aforesaid, procured their execution of the same by having it, to all appearance, the mortgage which they had read at their home, and substituting it in place thereof; that appellees were in the notary's office but a short time, long enough to affix their signatures aforesaid, and it was two months thereafter before they learned that the instrument which they had signed was a quitclaim deed to said real estate instead of the said mortgage. A copy of the quitclaim deed is filed as an exhibit to the complaint; and it is alleged that because of the fraud and deceit of the appellant which he practiced upon appellees by reason of his knowledge of the confidence which they reposed in him as their stepfather, the deed should be set aside as fraudulent and void. A demurrer was overruled to this complaint, and the ruling so made is first complained of as error.

The complaint, as we think, states a good cause of action. It is true that, in general, a person who executes a written instrument without reading it will not be relieved of the consequences of his want of care, but there are exceptions to this rule; and when it appears that one was deceived without fault on his part, by relying upon the representations of an-

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other in whom he had good right to repose trust and confidence, the court, if satisfied of the truth of such allegations, will set aside the instrument as procured through fraud.

It has often been decided that a deed or other contract may be set aside for such fraudulent misrepresentations, even though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the other party's information. *Matlock v. Todd*, 19 Ind. 180; *Peter v. Wright*, 6 Ind. 183; *Robinson v. Reinhart*, 137 Ind. 674. "Ordinarily," says Judge Elliott, in *Robinson v. Glass*, 94 Ind. 211, "one contracting party has no right to rely upon the statements of the other as to the character or contents of a written instrument; but while this is true, it is also true that if a known trust and confidence is reposed in the person making the representations, and there is a relationship justifying such trust and confidence, then the persons to whom the representations are made may rely upon them." Citing *Shaeffer v. Sleade*, 7 Blackf. 178; *Peter v. Wright*, *supra*; *Bischof v. Coffelt*, 6 Ind. 23; *Matlock v. Todd*, *supra*; *Worley v. Moore*, 77 Ind. 567; 2 Parsons Contracts (7th ed.), 774.

In *Shaeffer v. Sleade*, *supra*, it was said by the court, citing many authorities, that "When a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement or motive to the act of the other party, and by which an undue advantage is taken of him, is regarded as a fraud against which equity will relieve."

The allegations of the complaint before us disclose a studied design by appellant to deceive his stepson and wife, under the guise of asking them to aid him in borrowing money on a mortgage, according to which they were induced to execute a deed, believing and trusting in their stepfather that the paper they were signing was the same mortgage which he had shown to them at the dinner in their home a

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short time before, and which they had there read and understood. As said by Judge Story, cited in *Peter v. Wright*, 6 Ind. 183, "Where a party designedly produces a false impression in order to mislead, entrap, or obtain undue advantage over another—in every such case there is fraud;—an evil act with an evil intent." 1 Story Eq. Jur. 201.

In *Byers v. Daugherty*, 40 Ind. 198, it was said: "Where a different instrument from that which the party supposes he is executing is fraudulently substituted by the other party to it, there can be no doubt but that this is fraud. The party does not do what he meant to do. He intended to sign one instrument, and by the fraud is made to sign another and different one." Citing 1 Chit. Pl. 483, note 1; *Van Valkenburgh v. Rouk*, 12 John. 337; *Taylor v. King*, 6 Munf. (Va.) 358.

*Miller v. Powers*, 119 Ind. 79, and other cases relied upon by appellant, are, as we think, not applicable to such a case as this. It is true, in general, as already intimated, that one who executes a written instrument without reading it, or otherwise assuring himself of its contents, must suffer any evil consequences of such folly. But the law recognizes that the relations of persons may be such that one may rely implicitly upon the good faith and confidence resulting from such relationship. It may be that, even in such a case of misplaced confidence, innocent third parties will not be allowed to suffer by the want of caution on the part of the confiding and deceived party to the contract. For it is held that of two innocent parties that one must suffer whose act, though innocent, has been the means used to perpetrate the wrong, rather than the one who was in no way instrumental in bringing about such wrong. Here, however, it is the wrongdoer himself who is seeking to charge the party that confided in him and was thereby deceived. The deceiving party can not thus take advantage of his own wrong and charge his victim with neglect in having failed to guard against such deception. The rule is therefore, as stated, that one who, by



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reason of known trust and confidence reposed in another, relies, and has good cause to rely, upon representations made by such other party, and is thereby overreached and wronged, may be relieved as against such wrong, in case no innocent third parties are thereby injured.

Under the assignment that the court erred in overruling the motion for a new trial, it is first contended that it was error to allow the witness Josie Sargent to testify that she informed the appellees that the instrument executed by them was a quitclaim deed. No good reason is given why this evidence was not proper. The evidence was most competent, as corroborating the evidence of appellees that they did not know that the instrument executed by them was a deed, but supposed it to be a mortgage. Indeed the detailed evidence of this witness, who had been brought up as a daughter in the family of appellant, and with whom he talked freely after he had procured the quitclaim deed, went very far to show that he had completely deceived the appellees and procured a deed from them under the guise of persuading them to join in a mortgage to enable him to engage in business.

Neither is any good reason shown why the appellee Carrie B. Masterson should not have been allowed, as she was, to testify to the trust and confidence reposed by her in the appellant, as her husband's stepfather. Such testimony furnished the reason for her readiness to execute the instrument in appellant's favor, as requested by her husband, and showed a sufficient reason for her want of care in not asking to have it read before she signed it.

Complaint is also made that appellant was not allowed to testify as to the reason why he had an old deed with him at the time of taking dinner at appellee's house; and that he was also not allowed to testify as to a mortgage made on the property in question at a time subsequent to the date of the quitclaim deed. We are unable to see what relevancy these proposed items of evidence had to the transaction complained of. If the evidence had been admitted it could not in any

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way have shown any explanation or justification of the charge made against appellant of having deceived appellees into executing the quitclaim deed instead of the mortgage which they believed they were executing.

It is finally contended that the decision of the court is not sustained by sufficient evidence, that it is contrary to the evidence and contrary to law. The discussion in support of these contentions proceeds on the ground that the evidence, in order to prevail against a deed regular in form and duly executed, ought to satisfy the court beyond all reasonable doubt that the execution of the deed was procured through the fraud of the grantee. We do not think that the rule so contended for applies to such a case as this. It is true that where a person has had full opportunity to know of the contents of a written instrument before executing it, and the parties to the contract afterwards differ as to their understanding of its terms, one asserting and the other denying that the writing correctly expresses the terms of the contract as previously agreed to, then, no doubt, the rule is that only the most convincing proof will be accepted as sufficient to overcome the written, signed and acknowledged instrument of the party who afterwards denies the authenticity of such instrument. *Habbe v. Viele*, 148 Ind. 116.

Here, however, the very contention is, not that there was any mistake as to the terms of an instrument which both parties had full opportunity to read and understand, but that, by the fraud of one party, caused by the known trust and confidence properly and legitimately reposed in him by the other, the second party was deceived and lulled into security, so that reliance was placed upon false representations, and a document altogether different from that intended was in good faith acknowledged and executed. Such deception takes the place of force. There is no free meeting of mind with mind, and no valid contract entered into. The fact of such fraud is to be proved and found as any other fact, and that by a consideration of the evidence presented. We are, be-

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sides, of opinion that the evidence before the court, and all the surrounding circumstances, were such as to have amply justified the court in reaching the conclusion that the execution of the quitclaim deed was procured by imposing upon the appellees through the parental influence of the appellant. To hold the deed good would be to hold that a young man, without other property, and with a wife and children to support, should, without consideration or compensation of any kind, be willing to relinquish all claim to any part of the only property or estate left him by his mother. That he should be willing to join in a mortgage upon this property to enable one who occupied to him the place of father to procure a loan of money, seems to have gone a long way in filial duty; but that he should go further, and be willing to give away from his wife and children all his patrimony to enable his stepfather to engage in business, seems at least to call for some explanation. The record shows none. Even if the case called for evidence beyond a reasonable doubt to support the conclusions reached, we are not sure that such evidence is not shown.

Judgment affirmed.

## NELSON ET AL. v. COTTINGHAM ET AL.

[No. 18,532. Filed January 25, 1899.]

**SPECIAL FINDING.**—*When Treated as a General Finding.*—Where the record contains what purports to be a special finding with conclusions of law, which does not appear to have been made at the request of any of the parties to the action, it will be treated as a general finding. *p. 136.*

**SAME.**—*Conclusions of Law.*—*Exceptions.*—*Appeal and Error.*—The correctness of the conclusions of law upon the facts found can only be presented by exceptions to each conclusion of law and assigning as error such conclusions. *pp. 136, 137.*

**FRAUDULENT CONVEYANCE.**—*Husband and Wife.*—*Excessive Judgment.*—*Relief.*—No error was committed in overruling defendant's motion for judgment in an action to set aside as fraudulent a conveyance of real estate from husband to wife, where the facts found showed that after deducting the wife's one-third interest in the real

152	135
155	138
156	545
156	568
152	135
159	242
159	480
152	135
160	539
152	135
168	423

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estate conveyed, and the husband's \$800 exemption, there remained a small balance subject to plaintiff's debt, as defendant's remedy was by motion to modify the judgment. *pp. 133, 139.*

From the Hamilton Circuit Court. *Affirmed.*

*T. J. Kane, R. K. Kane and T. E. Kane*, for appellants.

*Roberts & Vestal and Fertig & Alexander*, for appellees.

MONKS, C. J.—Appellees brought this action to set aside as fraudulent, conveyances of certain real estate made by Alvin S. and Milton H. Nelson, through a trustee, to their wives, the appellants, Sarah J. Nelson and Mary Nelson. Final judgment was rendered in favor of appellees, setting aside said conveyances, and ordering that said real estate be sold to pay appellees' judgments against said Alvin S. and Milton H. Nelson. Only Sarah J. Nelson and Mary Nelson appeal, and each separately assign errors. The errors assigned are: (1) The court erred in its conclusion of law; (2), the court erred in overruling the motions for judgment in her favor on the special finding of facts.

The record contains what purports to be a special finding by the court, with conclusions of law thereon; but as it does not appear that the same was made at the request of any of the parties to the action we are compelled to treat it as a general and not a special finding. *Jacobs v. State*, 127 Ind. 77, and cases cited; *Sheets v. Bray*, 125 Ind. 33, and cases cited. No question is therefore presented by the first error assigned.

Section 560 Burns 1894, section 551 Horner 1897, requires that in a special finding the court shall first state the facts in writing and then the conclusions of law upon them, "and judgment shall be rendered accordingly." This is for the purpose of enabling a party to except to the decision of the court upon the questions of law involved in the case. If a judgment rendered in such a case should not conform to the conclusions of law stated, the remedy is by motion to modify the judgment, so as to conform to the conclusions of law;

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but where the judgment rendered is in accordance with the conclusions of law stated, error, if any, in such conclusions, is not reached by a motion to modify the judgment, but by exceptions to each of such conclusions, and a proper assignment of error thereon in the court having jurisdiction of such case on appeal. *Nading v. Elliott*, 137 Ind. 261, and cases cited; *Smith v. McKean, Adm.*, 99 Ind. 101, 107; *Radabaugh v. Silvers, Adm.*, 135 Ind. 605, and cases cited. Therefore, when a motion is made to render judgment on a special finding which will not be in accordance with the conclusions of law if rendered, and the same is overruled and judgment is rendered in conformity with such conclusions, even though they may be erroneous, an assignment of error in this court that the court erred in overruling said motion for judgment will not present any question for decision and will be unavailable, for the reason that the correctness of the conclusions of law upon the facts found, can only be presented in this State by exceptions to each of said conclusions of law at the proper time, and assigning as error that the court erred in said conclusions. In other words, the correctness of the conclusions of law is not reached by a motion for a judgment, nor by a motion to modify or for a new trial. This has been uniformly held by this court. *Royse v. Bourne*, 149 Ind. 187; *Pfau, Treas., v. State, ex rel.*, 148 Ind. 539; *Lewis v. Haas*, 50 Ind. 246; *Lynch v. Jennings, Adm.*, 43 Ind. 276; *Cruzan v. Smith*, 41 Ind. 288; *Peden's Adm. v. King*, 30 Ind. 181; *Elliott's App. Proc.*, section 793.

While the overruling of motions to render judgment on a special finding not in conformity with the conclusions of law, even though they may be erroneous, will not reverse a cause, for the reason that no question can be presented on such ruling, yet if such motion were sustained and final judgment rendered according to the special finding, and contrary to the conclusions of law, they being erroneous, or if such judgment were rendered by the court of its own accord without any motion to that effect, such action of the court would

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render harmless the error in the conclusions of law, and would furnish no grounds for reversal because such ultimate judgment would be correct upon the facts found. *White v. Chicago, etc., R. Co.*, 122 Ind. 317, 7 L. R. A. 257; *Sphung v. Moore*, 120 Ind. 352; *Chicago, etc., R. Co. v. Barnes*, 116 Ind. 126; *Slauter v. Favorite*, 107 Ind. 291, 300; *Krug v. Davis*, 101 Ind. 75. The finding in this case, however, is as we have held, to be treated as a general finding, and the motion for judgment in favor of said appellants presents the question whether they were entitled to judgment thereon in their favor.

The finding shows that the value of the real estate conveyed to appellant Sarah J. Nelson was \$800, and that her husband was a resident householder of the State, and had no other property at the time of said conveyance except personal property worth \$183, which he had claimed as exempt, making the entire value of his property, real and personal, \$983; that the real estate conveyed to Mary Nelson was worth \$800, and that her husband was a resident householder of the State and had no other property except personal property worth \$267, which he had claimed as exempt, making the total value of his property \$1,067. In all other respects the finding sustains the allegations of the complaint.

Each of appellants insists that under said general finding she is entitled to hold one-third in value of the real estate conveyed to her and the remainder of the \$600 exemption given by law to her husband, after deducting the value of the personal property claimed by him as exempt, free from the judgments of appellees, citing *Citizens Bank v. Bolen*, 121 Ind. 301; *Phenix Ins. Co. v. Fielder*, 133 Ind. 557; *Brigham v. Hubbard*, 115 Ind. 474, 478; *Taylor v. Duesterberg, Adm.*, 109 Ind. 165, 169, 170; *Smith v. Selz*, 114 Ind. 229, 235.

Conceding without deciding as to the correctness of this insistence (see, however, *Marmon v. White*, 151 Ind. 445), a

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calculation upon the basis claimed shows that there was \$116.34 in value of the land conveyed to appellant Sarah J. Nelson that she was not entitled to hold free from appellees' judgments, and \$200.34 in value of the land conveyed to appellant Mary Nelson that she was not entitled to hold free from appellees' judgments. It is clear, therefore, that upon the basis claimed appellants were not entitled to a judgment in their favor, and the court below properly overruled their motions therefor. If the judgment gave appellees more relief than they were entitled to under the finding, the remedy was by motion to modify the judgment. *Jarrell v. Brubaker*, 150 Ind. 260; *Evans v. State*, 150 Ind. 651, 655, 656, and cases cited. No such motion was made.

Finding no available error in the record the judgment is affirmed.

UNION NATIONAL SAVINGS AND LOAN ASSOCIATION v.  
HELBERG ET AL.

[No. 18,525. Filed Nov. 23, 1898. Rehearing denied Jan. 25, 1899.]

**MECHANIC'S LIEN.**—*Foreclosure.*—*Failure to Make Holder of Junior Mortgage a Party.*—A mechanic's lien was foreclosed and the property purchased by the lien holder under a decree of foreclosure. The holder of a mortgage junior to the mechanic's lien was not made a party to the proceedings. *Held*, in an action to foreclose the mortgage, which action was brought more than a year after the notice of intention to hold the lien was filed, that the holder of the mechanic's lien had lost the seniority thereof, but had an owner's equity of redemption.

From the Lake Superior Court. *Reversed.*

*Walter Olds* and *C. F. Griffin*, for appellant.

*Peter Crumpacker*, for appellees.

**HACKNEY, C. J.**—The appellant sued to foreclose a mortgage executed by the appellee, Helberg. The appellee, Mosier, by cross-complaint, sought to enforce a mechanic's lien as senior to the mortgage. The essential facts were that Helberg owned a lot in the city of Hammond, and, in De-

152	139
151	470
152	106
152	189
159	569
159	570

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cember, 1892, contracted with Mosier for the erection of a dwelling-house. The dwelling-house was under construction when, in March, 1893, the appellant, with knowledge of said contract and the work upon said house, made a loan of \$1,300 to Helberg, which loan was secured by a mortgage on said lot. On the 30th day of September, 1893, within the statutory time, Mosier gave the proper notice of a mechanic's lien. On the 8th day of September, 1894, Mosier sued to foreclose said lien, not making the appellant a party, and in February, 1895, purchased said property under a decree of foreclosure. The lower court held the lien of Mosier senior to that of the appellant, and that holding presents the question for decision by this court.

It is not questioned that, in point of time, the mechanic's lien was, by relation back to the time when the work began, senior to the mortgage, but it is insisted that by the failure to bring suit to foreclose such lien, as against the appellant, within one year from the giving of such notice, the lien was waived as to the appellant. The statute, giving the remedy for the foreclosure of mechanic's liens, provides that "Any person having such lien may enforce the same by filing his complaint in the circuit or superior court of the county where the labor was performed, or the materials, machinery, articles, things or service furnished or rendered at any time within one year from the time when said notice has been received for record by the recorder of the county; \* \* \* and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void \* \* \*." Section 7259 Burns 1894, section 5298 Horner 1897. It will thus be seen that the remedy is limited to one year, and if the complaint is not filed during that period the lien is void. We have seen also that the remedy, as against Helberg, the owner of the property, was enforced within the year. Does the statute require that the remedy shall be enforced also against existing junior lien holders, within the year, to save the validity of the senior lien?



The requirement of the statute is general and contains no exception applicable to this case. Its object was to prevent the *ex parte* encumbrance from beclouding titles and embarrassing dealings with reference to the property for a longer period than one year. This object cannot be said to concern the property owner alone for the junior encumbrancer is interested in having the lien determined while the extent of labor or materials may be more easily ascertained and while values, as to the lien, may not become obscure, and, as to the property, may not become impaired. A foreclosure, as against a junior lienor alone, could hardly be said to satisfy the statutory requirement if objection were made by the property owner. If upon such foreclosure, the year having expired, the owner could assert the invalidity of the lien, it would seem that the rule should also be upheld that a foreclosure against the owner alone would not preclude the junior lienor to assert the invalidity of the lien as against his lien. Even as between mortgagees, where the senior is foreclosed without bringing in the junior, the foreclosure is a nullity as to the junior. *Gaskell v. Viquesney*, 122 Ind. 244, and authorities there cited; *Catterlin v. Armstrong*, 101 Ind. 258. The same rule has been generally applied to mechanic's liens. See 15 Am. & Eng. Ency. of Law, p. 165, note 4. If the analogy is fair, and we think it is, we may say that the foreclosure by Mosier was, as to the appellant, as no foreclosure, and did not preclude or estop the appellant to deny the validity of the lien under the provisions of the statute.

In Alabama it was held, in an action to foreclose a lien, commenced against the husband within the statutory period, the wife being brought in by amendment after the period, that the statute was a bar in her favor. *Seibs v. Engelhardt*, 78 Ala. 508. In *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437; and *McGraw v. Bayard*, 96 Ill. 146, it was held that a suit within the statutory period, against the property owner and to which a junior encumbrancer was made a party after the statutory period, could not be main-

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tained against the junior encumbrancer. In *Dunphy v. Riddle, supra*, it was held that the limitation, "unless suit be instituted to enforce such lien within six months," required that the suit should be instituted against the owner, creditor, or encumbrancer to be available. In this State it has been held that the limitation applies in favor of a purchaser pending the lien. *Holland v. Jones*, 9 Ind. 495; *Marvin v. Taylor*, 27 Ind. 73; *Schneider v. Kolthoff*, 59 Ind. 568. These holdings support the conclusion that the statute is available in favor of all who are interested and against whom proceedings have not been instituted within the limited period.

While we hold that the failure to make the appellant a party to his foreclosure lost to Mosier the seniority of his lien, we do not hold that his foreclosure was entirely fruitless. It had the effect to place Mosier in the shoes of Helberg and to carry to him the equity of redemption. *Holmes v. Bybee*, 34 Ind. 262; *Catterlin v. Armstrong*, 101 Ind. 258; *Browning v. Smith*, 139 Ind. 280.

The judgment is reversed, with instructions to sustain the demurrer to the cross-complaint, and to grant a new trial.

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HELT ET AL. v. HELT.

[No. 18,611. Filed Jan. 26, 1899.]

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153	143
154	144

**DESCENT AND DISTRIBUTION.—Husband and Wife.—Childless Second Wife.**—Section 1 of the act of March 11, 1889 (Acts 1889, p. 430, section 2644 Burns 1894) providing that if a man marry a second or subsequent wife and has by her no children, but has children alive by a former wife, the interest of such wife in the lands of her husband shall be a life estate, and the fee of the same shall vest in such children at the death of the husband is void, as it seeks to amend section 2 of the act of 1853 which was repealed by the act of March 9, 1867. pp. 143, 144.

**SAME.—Husband and Wife.—Childless Second Wife.**—Plaintiff brought suit for partition of her one-third interest in her deceased husband's real estate. The pleadings show that plaintiff was a second wife, having no children by the marriage existing at the time of the husband's death, but having a child living by a prior marriage between her and her said husband, which had been dis-

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solved, and that the husband had children living by a previous wife. Held, that the rights of plaintiff in said lands are determined by section 2487 R. S. 1881, or section 2640 Burns 1894, either of which gives her one-third of the land in fee simple, with limitation as to descent and disposition thereof as provided in section 2487 R. S. 1881, or section 2641 Burns 1894. pp. 143-145.

From the Bartholomew Circuit Court. *Affirmed.*

*George W. Cooper and Cassius B. Cooper, for appellants.*

*M. D. Emig and J. F. Cox, for appellee.*

MONKS, C. J.—It appears from the record that one Henry Helt, a widower, having children by a former marriage, married appellee; that he had by her one child, the appellant Mollie Helt, her co-appellants being the children of said Henry Helt by his first wife. Afterwards, in 1880, appellee and said Henry Helt were divorced. In 1890, they were again married, but no child was born to them during the last marriage. Afterwards said Henry Helt died intestate, the owner of real estate in Bartholomew county, Indiana, leaving surviving him appellee, his widow, and appellants, his children, one of whom, Mollie Helt, was a child of his first marriage with appellee, and the others his children by his first wife.

An action was brought in the court below for partition of said real estate, by appellee against appellants, and the court held that the undivided one-third of the real estate of which said Henry Helt died seized, descended in fee simple to appellee, and the other undivided two-thirds descended in fee simple to appellants, and partition was so made and confirmed. Appellants insist that, under the facts found, appellee, having no children born to her during said second marriage, was, at the death of her husband, a subsequent childless wife, within the meaning of section 1 of the act of March 11, 1889 (Acts 1889, p. 430, being section 2644 Burns 1894, section 2487 Horner 1897); and that she inherited the undivided one-third of said real estate for life only, and ap-

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pellants inherited all of said real estate, subject to appellee's estate for life in the undivided one-third thereof.

By section 1 of the act of 1889 (Acts 1889, p. 430), being section 2644 Burns 1894, section 2487 Horner 1897, it was attempted to amend section 2 of the act of March 4, 1853 (Acts 1853, p. 56), which last named section was repealed by the act of March 9, 1867 (Acts 1867, p. 204). *Longlois v. Longlois*, 48 Ind. 60, 63, and cases cited; *Hoffman v. Bacon*, 50 Ind. 379, 380. Section 2 of the act of 1853, which section 1 of the act of 1889 sought to amend, was repealed in 1867, and was not, therefore, in force in 1889. It is settled law in this State that an act which attempts to amend a repealed act is void. *Smith v. McClain*, 146 Ind. 77, 88, 89; *Boring, Aud., v. State*, 141 Ind. 640, and cases cited. It is evident that when section 1 of the act of 1889, being section 2644, 2487, *supra*, was passed, section 2 of the act of 1853, which it attempted to amend, was not in existence, having been repealed in 1867, and that said section 1 of the act of 1889, being section 2644, 2487, *supra*, is void. *Smith v. McClain, supra*, pp. 88, 89. Said section 2644, 2487, *supra*, being void, it follows that section 2487, R. S. 1881, being section 24 of an act approved May 14, 1852 (R. S. 1852, p. 251), has been in force since the act of 1867, *supra*, took effect. *Longlois v. Longlois, supra*, pp. 62-65, and cases cited; *Waugh v. Riley*, 68 Ind. 482, 493, 494; *Teter v. Clayton*, 71 Ind. 237, 239. It is clear, therefore, that the right of appellee in said lands is determined by either section 2487 R. S. 1881, being section 24 of an "act approved May 14, 1852" (R. S. 1852, p. 251), or section 2640, Burns 1894, section 2483 Horner 1897, which last named section expressly gives the wife an estate in fee simple of all the lands of which her husband died seized.

Under said section 2487 R. S. 1881, being section 24 of an act approved May 14, 1852, "it has been uniformly held by this court, since the case of *Utterback v. Terhune*, 75 Ind. 363, decided in 1881, \* \* \* a second or subsequent

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wife, having no children by her husband living at his death, took a fee in his lands when he died leaving children alive by a previous wife and that upon her death, the children of the former wife or wives become her forced heirs," and inherited the land from her which she inherited from her husband. *Byram v. Henderson*, 151 Ind. 102, and cases cited; *Haskett v. Maxey*, 134 Ind. 182, 187, 19 L. R. A. 379, and cases cited. Appellee therefore inherited an undivided one-third of the land in controversy in fee simple, regardless of which section determines her rights. If the land descended to her under section 2640 Burns 1894, section 2483 Horner 1897, she may dispose of it as she pleases, by will or otherwise, except as limited by section 2641 Burns 1894, section 2484 Horner 1897, if she marry again. But if the lands descended to her under section 2487 R. S. 1881 (section 24, R. S. 1852, vol. 1, p. 251), the same will descend to the children of her deceased husband, or their descendants, if they survive her. *Byram v. Henderson*, *supra*. The trial court did not err, therefore, in holding that appellee inherited the undivided one-third of the land in controversy in fee, and in rendering judgment confirming partition of said land when so made.

Under the issues in the cause, the trial court was not required to determine, nor did it determine, which of said sections governs the rights of appellee. Neither is said question decided by this court, because the same is not presented by the record. Judgment is affirmed.

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DAVIS v. THE STATE.

[No. 18,528. Filed January 31, 1899.]

CRIMINAL LAW.—*Defense.—Special Pleas.*—Such matters of defense as might have been set up by special plea at common law may yet be presented in that manner in this State. p. 148.

SAME.—*Defenses Which May be Specially Pleaded.*—Besides the special pleas to the jurisdiction of the court and in abatement, the only de-

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fenses that may be specially pleaded are a former acquittal, a former conviction, and insanity. pp. 148, 149.

**CRIMINAL LAW.—Evidence.—Record of the Trial and Conviction of Another Charged With Same Offense.**—The record of the trial and conviction of another person who was indicted and separately tried for the same offense is not admissible in evidence either to prove defendant's innocence or to establish the grade of the offense. p. 149.

**SAME.—Instruction.—Harmless Error.**—An instruction directing the jury to assess the punishment of defendant if they found him guilty, when under the law they could determine only the question of guilt or innocence, is harmless. pp. 151, 152.

From the Fountain Circuit Court. *Affirmed.*

*S. D. Puett, J. S. McFadden and C. M. McCabe*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *J. W. Bussey*, for State.

**DOWLING, J.**—Indictment for murder in the first degree, in the Parke Circuit Court. On the application of appellant the venue of the cause was changed to Fountain county, there was a trial by a jury, and appellant was found guilty of voluntary manslaughter. Motions to quash the indictment were overruled. Demurrers to the second, third, and fourth special pleas to the second count of the indictment were sustained. Motions for a new trial and to modify the judgment were overruled. These rulings are assigned for error.

Counsel for appellant having failed to point out any defect in the indictment, the objections to the decision of the court on the motions to quash are waived.

The first questions presented for examination here arise upon the action of the court in sustaining demurrers to the second, third, and fourth special pleas to the second count of the indictment.

The substance of each of these pleas is as follows: That on the 21st day of May, 1896, the defendant herein and one Barney Robards were quietly and peaceably walking along and upon a certain street and public highway in the town of

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Judson, Parke county, Indiana, going to their homes, each carrying a shotgun the said Robards walking in front, and this defendant following a few feet behind him in the same path, neither pursuing any one nor fleeing from any one, when suddenly the said Robards was confronted by the said John Newkirk, with a drawn revolver in his hand, aimed directly at said Robards, and that said Robards immediately raised his gun, and fired off, and discharged the same into the body of the said Newkirk, killing him instantly. That from the time said Newkirk made his appearance, confronting Robards as aforesaid, until he was shot and killed, this defendant was several feet behind the said Robards, and said Robards was unable to see this defendant at any time during said transaction, and that this defendant did not at any time from the time said Newkirk appeared, until said Robards shot and killed him as aforesaid, utter any word or sound, or make any sign or gesture, and that he did not realize what was being done until the said Newkirk was shot and killed as aforesaid, and that he, said defendant, did not at any time fire off, or discharge the gun which he carried, or any other gun, at, against, or into the said Newkirk, but that said Newkirk was shot and killed by the said Robards as aforesaid, and not otherwise. That said Barney Robards was thereafter duly charged by separate indictment in the Parke Circuit Court with the crime of murder in the first degree, for having shot and killed the said John Newkirk, and thereafter, the venue of said cause having been changed to the Fountain Circuit Court, that the said cause came on for trial in and by said Fountain Circuit Court, before a jury legally impaneled; and that upon said trial the said Robards was by the verdict of said jury, and the judgment and sentence of said court, convicted and found guilty of the crime of manslaughter, under said indictment, and was thereby acquitted, and found not guilty of any higher degree of homicide or crime therein.

The third plea omits the narrative of the circumstances attending the shooting of Newkirk, and states only the facts of

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the indictment, trial, and conviction of Robards of the crime of manslaughter.

The fourth plea, after the allegations concerning the indictment, trial, and conviction of Robards, states, that the defendant did not by word, sign, or gesture, in any manner participate in the acts constituting the crime of which Robards was convicted; nor did he at the time of the commission of said offense, counsel, encourage or command the said Robards to shoot the said Newkirk, or aid or abet the said Robards in any way in the commission of said crime of manslaughter.

Notwithstanding the provisions of the statute, that in all criminal prosecutions the defendant may plead the general issue orally, and under it may prove on the trial that he has before had judgment of acquittal, or been convicted, or pardoned for the same offense, or any matter of defense, except insanity, it has been held in this State that such matters as might be set up by special plea at common law may yet be presented in that manner. Section 1832 Burns 1894; *Clem v. State*, 42 Ind. 420; *Neaderhouser v. State*, 28 Ind. 257; *State v. Barrett*, 54 Ind. 434.

But the object of a special plea in criminal procedure is not to traverse the charge contained in the indictment, or to give in detail the circumstances constituting the defense. At common law its scope was limited to certain special defenses, and no reason exists at this day for enlarging its range.

It is said in *Clem v. State*, 42 Ind. 431: "The defences which a defendant might plead specially in bar of the indictment were formerly of four kinds; a former acquittal, a former conviction, a former attainder, and a pardon. But as attainders are prohibited in this country, Const. U. S., article 1, section 10, and as pardons are not granted until after conviction, State Const., article 5, section 17, the defences which a defendant may thus plead specially are reduced to two; a former acquittal and a former conviction."

Since the decision in *Clem v. State*, *supra*, a statute has



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been enacted requiring the defense of insanity to be specially pleaded. Section 1833 Burns 1894, section 1764 Horner 1897.

Special pleas to the jurisdiction of the court, and in abatement, are allowed. 2 Hawkins' Pleas of Crown, 514; Wharton's Crim. Pl. and Pr., sections 422, 423; 1 Bishop's Crim. Procedure, section 791.

None of the matters contained in the second, third, and fourth pleas to the second count of the indictment are such as can be specially pleaded. They could not have been so pleaded at common law, nor does the code of criminal procedure authorize that mode of pleading such defenses. The demurrers to these pleas were properly sustained.

The motion for a new trial calls in question the action of the court in sustaining objections to certain evidence offered by appellant, and in admitting other evidence over his objection. The record of the trial and conviction of Barney Robards for the crime of manslaughter in killing Newkirk was properly excluded. The guilt or innocence of the appellant of the crime with which he was separately charged, did not depend upon the conviction or acquittal of Robards. Nor was the grade of appellant's crime fixed by the verdict and judgment in the case against Robards.

We have carefully examined all of the evidence objected to by appellant, and are of the opinion that wherever it was at all material, it was properly admitted; and that where it was immaterial, the appellant sustained no injury by it. The testimony excluded by the court was clearly incompetent, and we find no error in these rulings.

The court of its own motion gave to the jury instructions numbered from one to forty-nine, inclusive. These instructions cover every aspect of the case, and state the law with clearness and precision. The criticism of counsel for appellant is directed against the thirtieth, thirty-seventh, and thirty-ninth, which were as follows:—

“30th. If a person sought to be arrested is inflamed by an-

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ger and intoxication, and is known by the officer to be armed and dangerous, and the circumstances are such, and the character of the person to be apprehended is such, that the officer is justified in believing, and does honestly believe, that unless he first obtains dominion over the person, so sought to be arrested, that he cannot with safety to his life make the arrest, then such officer would be justified in presenting a weapon to the offender, for the purpose, not of taking his life, but of obtaining dominion over him, and effecting his arrest with safety to himself, and his so doing would not, under such circumstances, be wrongful in the officer.

"87. It is the defendant's contention that he, Robards, was moved to fire the fatal shot by fear of his life and person from the assault of the deceased, while the State contends that the shot was fired by the *defendant*, not from fear of his life or person, but to prevent his arrest by the deceased as marshal of the town of Judson. If, after a full and careful consideration of the evidence in the case, you entertain a reasonable doubt as to whether or not Robards, at the time he fired the shot that killed the deceased, if you find that he did fire it, in fear of his life and person, and for the purpose of defending himself from apprehended danger to his life and person, or that he fired it to prevent the deceased from arresting him, that doubt must be resolved in favor of the defendant, and you must find that the shot was fired in Robards' defense, and acquit defendant.

"89. In determining whether or not, on one hand, Robards shot the deceased in his necessary self-defense, or what appeared to him at the time to be his necessary defense, or on the other hand, that he shot the deceased solely to prevent the deceased from arresting him, you have a right to consider all the circumstances developed by the evidence that throw light upon the subject. You have a right, among other things, to consider the previous relations of Robards and deceased; whether or not they were amicable or otherwise, and whether or not, from such previous relations, Robards had

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reason to apprehend danger to his life or person from the deceased. You have a right to consider whether or not Robards knew of the official character of the deceased, if you shall find that he was an officer, and whether or not Robards, at the time the deceased was killed, if you shall find that he was killed, had done any act which he knew rendered him amenable to arrest, and whether or not he was at the time apprehending that the deceased would attempt his arrest, and whether or not, at the time the fatal shot was fired by Robards, if you shall find that he fired such shot, he recognized and knew who it was upon whom he fired the shot, and all that was said and done either by Robards or the deceased that will tend in any manner to enlighten your minds upon that question. You should consider the manner in which the deceased approached Robards, if he did approach him; whether or not he was armed with a revolver at the time, and what use he, the deceased, was making of such arms at the time. You, remembering that you are the sole judges of what facts and circumstances are established by the evidence, and of the weight that shall be given to each circumstance established in the case."

Taken in connection with the other instructions given, we find no error in the thirtieth, thirty-seventh, and thirty-ninth instructions above set out. The objections urged against each of them are fully met and removed by other parts of the charge of the court; every qualification and explanation thought necessary by counsel for appellant, are elsewhere stated; and the jury could not have been misled by the inadvertent use of the word "defendant" in the thirty-seventh instruction, where "Robards" was plainly intended.

Instruction numbered forty-eight is complained of because it directed the jury to assess the punishment of appellant, if they found him guilty. Under the law, the jury could determine only the question of the guilt or innocence of appellant, and an attempt by them to assess the punishment being inef-

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fectual, it follows, that this part of the instruction could do no harm. *Henderson v. People*, 165 Ill. 607, 46 N. E. 711.

No error was committed by the court in refusing to give the special instructions asked for by appellant. As far as they stated the law correctly, they were completely covered by the instructions given by the court of its own motion.

After a careful examination of all the evidence in the cause, we are satisfied that it fully sustains the verdict.

The last two errors assigned relate to the form of the judgment rendered by the court. The verdict was in these words:—"We, the jury, find the defendant guilty of manslaughter as charged in the second count of the indictment, and fix his punishment at imprisonment in the state prison for a period of three (3) years. We further find that he is twenty-nine years of age. James Bilsland, Foreman."

The judgment of the court was in accordance with the indeterminate sentence law.

The question of the constitutionality of this statute is no longer an open one in this State. *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109; *Skelton v. State*, 149 Ind. 641; *Vancleave v. State*, 150 Ind. 273; *Wilson v. State*, 150 Ind. 697.

Finding no error in the record, the judgment is affirmed.

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BOYD v. BLOOM.

[No. 18,680. Filed February 1, 1899.]

**EASEMENT.—Right of Way.—Gates.**—Where one grants a right of way across his land, he may shut the termini of the same by gates, which the grantee must open and close when he uses the same, unless an open way is expressly granted. *p. 154.*

**SAME.—Deed.—Construction.—Right of Way.**—A provision in a deed that the grantee should have a free and undisturbed right to use a certain way out to the public highway is not the grant of an open way preventing the grantor from maintaining a reasonable number of gates across the way. *pp. 154-156.*

**PLEADING.—Complaint.—Theory.**—Plaintiff must recover, if at all, on the theory of his complaint. *p. 157.*

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From the Noble Circuit Court. *Reversed.*

*H. G. Zimmerman*, for appellant.

*H. C. Peterson*, for appellee.

MONKS, C. J.—Appellant sued appellee to enjoin him from removing a gate erected across a private way, and for damages. After the issues were joined the court tried said cause, and made a special finding of the facts and stated conclusions of law thereon in favor of appellee, to each of which appellant excepted. Judgment was rendered in favor of appellee. The errors assigned call in question each conclusion of law.

It appears from the special finding that one Shanower owned two adjoining tracts of land, and that the north end of one of said tracts abutted upon a public highway. In 1890 said Shanower sold and conveyed to appellant's grantor, the tract abutting upon said highway, without any reservation in the deed, and at the same time sold and conveyed to appellee the other tract, providing in said deed that appellee "should have a free and undisturbed right to the use" of a way out to the public road on the tract conveyed to appellant's grantor, fifteen feet wide and about one hundred rods long. The deed to appellant's grantor was executed Oct. 14, 1890, and the deed to appellee was signed and acknowledged on Oct. 14, 1890, but was not delivered until the next day, Oct. 15. At the time that said deeds were executed said way was fenced on both sides from the land sold to appellee, north to the highway, leaving a passage way about fifteen feet wide between said fences, and so remained until April, 1895, when the west fence along said lane was taken down and removed by appellant who then owned the same, without the consent and over the objection of appellee, and has not since been replaced; that at the time said deeds were made gates or bars were maintained across said way about eighteen rods south of the highway where they remained until 1893, when they were placed by appellant's grantor at the north end of

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said way, next to the highway, without the consent of appellee. There was no understanding or agreement between appellee and appellant or his grantor, that a gate should be maintained on any part of said way; that the gate across the north end of said way next the highway was removed by appellee October, 1896, before the commencement of this action.

It is the rule established by the authorities that where one grants a right of way across his land he may shut the termini of the same by gates, which the grantee must open and close when he uses the same, unless an open way is expressly granted. *Phillips v. Dressler*, 122 Ind. 414, 17 Am. St. 375; *Frazier v. Myers*, 132 Ind. 71, 73; *Maxwell v. McAtee*, 9 B. Mon. 20, 48 Am. Dec. 409; *Garland v. Furber*, 47 N. H. 301; *Bean v. Coleman*, 44 N. H. 539; *Amondson v. Severson*, 37 Iowa 602; *Houpes v. Alderson*, 22 Iowa 160; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275, and note, p. 282; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Huson v. Young*, 4 Lans. 63; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *Frank v. Benesch*, 74 Md. 58, 28 Am. St. 237, and note, p. 239, 21 Atl. 550; *Short v. Devine*, 146 Mass. 119, 15 N. E. 148; *Green v. Goff*, 153 Ill. 534, 39 N. E. 975; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. 764, and note, p. 766, 34 N. W. 727; *Johnson v. Borson*, 77 Wis. 593, 20 Am. St. 146, and note, p. 151; *Sizer v. Quimlan*, 82 Wis. 390, 33 Am. St. 55, 52 N. W. 590; *Connery v. Brooke*, 73 Pa. St. 80; *Hartman v. Fick*, 167 Pa. St. 18, 46 Am. St. 659, and note, 31 Atl. 342; *Kohler v. Smith*, 3 Pa. Sup. Ct. 176; Washburn on Easements (4th ed.), pp. 255, 256, 291, 292; Goddard on Easements (Bennett's ed.), 330, 331; Jones on Easements, sections 400, 401, 405, 406.

It is insisted, however, by appellee that the words of the grant that he "should have a free and undisturbed right to use" the way, was an express grant of an open way, and ap-

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pellant had no right, therefore, to maintain gates across the same.

It is said by Mr. Washburn, in his work on Easements, page 255, "where the grant was of 'a free and unobstructed way' it was held that the owner of the land might maintain gates across it, unless this would be inconsistent with the purposes for which the way was granted. *Garland v. Furler*, 47 N. H. 304."

In *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538, it was held that when the provision in a deed was that the owner of the dominant estate was to have "free ingress and egress" over the servient estate, the owner of the servient estate had the right to maintain gates across the way which the owner of the dominant estate, then using the way, was required to open and close; that under said provision the sole right of the owner of the dominant estate was a right of passage. The court said, at page 519, "His grantor secured to him an easement of way, that is the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use. The plaintiff, as owner of the soil, has all the rights and benefits of ownership consistent with such an easement. (*Atkins v. Bordman*, 2 Metc. (Mass.) 457; *Bakeman v. Talbot*, 31 N. Y. 366. Among others must be the right to have his lands fenced or unfenced at his pleasure."

It was held in *Connery v. Brooke*, 73 Pa. St., at page 84, that a grant of the free right of passageway with free ingress and egress at all times, did not imply that a gate across it was an obstruction. The court said "The fact that the gate was there at the date of the grant, and that it was allowed to remain, cannot change the plain meaning of the words of the grant, but it may help us to ascertain the intention of the parties, if there be any doubt as to their meaning. \* \* \* But what is meant by the free use of a passageway? Does it necessarily mean that there shall be no gate or door hung across it, or if there is, that it shall always be kept open? Has

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not the owner of a passageway its free use if he hangs a gate across it at its intersection with the street? If I grant the free use, right and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open in order that the grantee may have the free use of it? Or can he not have its free use if he can enter it by opening the door whenever he chooses? Without doubt I cannot unreasonably obstruct his use of it, but if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction. Free is a relative term when applied to the use of a thing. It does not follow that I have not the free use of a room because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley because I have to open a gate to go in and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passageway; and it may be so constructed and placed as not to amount to any practical obstruction to its use. Whether a gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and under the circumstances, an unreasonable obstruction to the plaintiff's use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie."

It is clear we think, from the authorities cited, that the terms of the grant did not entitle the appellee to an open way out to the public road, and that appellant had the right to maintain gates across the way at the termini thereof. It is true that the owner of the servient estate has no right to maintain an unreasonable number or kind of gates, or to place the same so that they unnecessarily interfere with the use of the way by the owner of the dominant estate, but there is no finding that the gates across the way in controversy were not of a proper width, or were of a kind or so placed, as to be a practical or unreasonable obstruction to appellee's use of the way over appellant's land.



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It is insisted, however, by appellant that the deed from Shanower to appellee conveyed no right of way over appellant's land, for the reason that the special finding shows that Shanower had no title to the land owned by appellant when he executed the deed to appellee for said way. Whether or not this insistence of appellant is correct we need not determine for the reason, that the theory of his complaint is that appellee has the right to use the way in controversy, if he closes and properly secures the gates across the same. Appellant is not in position in this case to question appellee's right to use said way upon the conditions alleged in his own complaint. It follows that the court erred in its conclusions of law.

The judgment is reversed, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellant in accordance with this opinion.

THE TOWN OF WHITING v. DOOB.

[No. 18,593. Filed February 2, 1899.]

**PLEADING.**—*Amended Complaint.*—*Demurrer.*—An amended complaint supersedes the original, and a demurrer to the "complaint" filed after the filing of an amended complaint refers to the amended complaint. p. 158.

**MUNICIPAL CORPORATIONS.**—*Statutes Prohibiting Riding on Sidewalk.*—*Construction.*—The act of March 10, 1885 (section 3333, Horner 1897), empowering boards of town trustees to prohibit the encumbering of sidewalks, and riding or driving thereon, does not repeal by implication section 1640 Horner 1897, which forbids cities and towns to impose penalties by ordinance for offenses punishable under a statute of the State. pp. 159, 160.

**HIGHWAYS.**—*Vehicle on Sidewalk.*—*Bicycle a Vehicle.*—A bicycle is a vehicle the riding of which on a sidewalk of a city or town is a public offense punishable under section 3361 R. S. 1881. p. 160.

**MUNICIPAL CORPORATIONS.**—*Riding on Sidewalk.*—*Ordinance Which May be Enforced.*—As the statutes now stand in this State a municipal corporation may by ordinance impose a penalty for riding a bicycle on sidewalks other than those constructed of brick, stone, plank, or gravel. pp. 159, 160.

From the Lake Circuit Court. *Affirmed.*

152	157
164	216
152	157
167	584

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*Wartman & Miller and John G. Erdlitz, for appellant.*  
*F. N. Gavit, for appellee.*

DOWLING, J.—The appellee was charged with the violation of an ordinance of the town of Whiting in riding a bicycle upon a sidewalk of that corporation. The action was commenced by filing a verified complaint before a justice of the peace of Lake county. On the day of the trial, and before any other proceedings were had, an amended complaint was filed. Appellee thereupon filed a demurrer, which referred to this pleading as “the complaint.” The demurrer was sustained, and there was judgment for the appellee. An appeal to the Lake Circuit Court was taken by the town, and there, as is shown by the record, “the defendant renews his demurrer herein.” The court sustained the demurrer, and, the appellant refusing to amend or plead further, judgment was rendered for appellee. The town of Whiting appealed to this court, and the error assigned is the ruling of the court on the demurrer.

The objection is made by counsel for appellee that the demurrer was sustained, not to the complaint, but to the amended complaint, and, therefore, that no question is presented by the assignment of errors. We think otherwise. The amended complaint superseded the complaint first filed, so that it ceased to be a part of the record. *Kirkpatrick v. Holman*, 25 Ind. 293. The pleading last filed by appellant became the complaint in the cause, and was the only pleading on file to which a demurrer could be addressed.

The ordinance under which this proceeding was taken reads thus:—“Sec. 14. It shall be unlawful for any person to ride, propel, or use in any manner upon any sidewalk within the corporate limits of the town of Whiting, any bicycle, or safety-wheel, used for exercise, business, or pleasure; \* \* \*

Section 54 of this ordinance declares the penalty for a violation of its provisions.

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The validity of the ordinance is assailed on the ground that riding or driving upon the sidewalks of any town in this State is made a public offense against the State, for which punishment is prescribed, and that such offense cannot be made punishable by an ordinance of any incorporated town or city.

The sections of the statutes to be considered are these: "It shall be unlawful for any person to ride or drive upon the *brick, stone, plank, or gravel* sidewalk of any town or village, or upon any similar sidewalk for the use of foot passengers by the side of any public highway in this State, unless in the necessary act of crossing the same." Acts 1867, p. 194, section 4398 Burns 1894, section 3361 Horner 1897.

"Whenever any act is made a public offense against the State, by any statute, and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the State law only." Section 1640 R. S. 1881, section 1709 Burns 1894.

Counsel for appellant contend that an act authorizing boards of town trustees to prohibit the encumbering of the sidewalks of such towns, and riding or driving thereon, and empowering such boards to carry out the provisions of the act by by-laws, ordinances, and regulations, approved April 10, 1885, repeals, by implication, so much of the act of 1881, *supra*, as prohibits cities and towns from enforcing ordinances against acts which are punishable as offenses against the State.

We cannot discover in the act of 1885, any indication that it was intended to repeal the earlier statute. The two acts are not repugnant; the boards of towns may, by ordinance, by-law, or other mode of regulation, prohibit riding

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or driving on the sidewalks; but, by the terms of this very act, they must do so by by-laws, ordinances, or regulations *not repugnant to the laws of the State*. The object of the statute of 1881 was to prevent a double prosecution for a single act, by withholding from cities and towns the power to impose fines or penalties in any case where the offense was punishable under the criminal laws of the State. There is no reason to suppose that the legislature, by the act of 1885, intended to abolish this salutary restriction.

But the statute making it a misdemeanor to ride or drive upon a brick, stone, plank, or gravel sidewalk, being a penal one, it is to be strictly construed, and it could not be held to apply to the act of riding or driving upon sidewalks constructed of other materials than *brick, stone, plank, or gravel*. In an indictment, under this law, it would be necessary to state particularly the kind of sidewalk, whether brick, stone, plank, or gravel, over which the person charged rode or drove.

Riding or driving over sidewalks, other than such as are composed of *brick, stone, plank, or gravel*, not being made an offense against the State, and punishable as such, the authorities of cities and towns may lawfully prohibit riding or driving upon such sidewalks; and if in an action, under a general ordinance of a city or town, the complaint showed that the sidewalk, over which the defendant rode or drove, was not of *brick, stone, plank, or gravel*, but was constructed of other material, such ordinance would be valid as to such other kinds of sidewalks, and a prosecution might be maintained under the same.

In this case, the town ordinance is general in its terms. The complaint fails to show that the sidewalk, therein mentioned, is not of *brick, stone, plank, or gravel*, and that it is composed of some other material. Under such a complaint, if upheld, the penalty might be recovered against appellee even if the sidewalk was of brick, stone, plank, or gravel.

That a bicycle is a vehicle, and that riding a bicycle upon

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the brick, stone, plank, or gravel sidewalks of a town or city is a public offense against the State, punishable under the act of 1881, *supra*, is settled by the decisions of this court. *City of Indianapolis v. Higgins*, 141 Ind. 1; *Bybee v. State*, 94 Ind. 443.

As the complaint fails to show that the act charged against appellee was such as the town had authority to prohibit and punish, the demurrer to it was properly sustained. Judgment affirmed.

BOYD ET AL. v. SCHOTT ET AL.

[No. 18,296. Filed February 3, 1899.]

1898 161  
1899 90

JUDGMENT.—*Nunc Pro Tunc Entry*.—The oral announcement in open court to the counsel of both parties that the court rendered and would cause to be entered a judgment for the plaintiff is not a sufficient basis for the entry of a judgment *nunc pro tunc*. p. 163.

PRACTICE.—*Nunc Pro Tunc Entry*.—*Parol Evidence*.—It is only in connection with some written minute or memorandum of the court's action, that parol evidence is admissible in support of a motion for a *nunc pro tunc* entry. p. 164.

APPEAL AND ERROR.—*New Trial as of Right*.—*Granting of Before Final Judgment*.—It is error to grant a new trial as of right before final judgment is entered. p. 164.

SAME.—*Granting New Trial as of Right*.—*Waiver*.—Where a new trial as of right is erroneously granted, a party who has duly excepted to such ruling of the court does not waive his exception by following the case through a subsequent trial. p. 165.

From the Wells Circuit Court. *Reversed*.

J. S. Dailey, Abram Simmons and F. C. Dailey, for appellants.

A. N. Martin and W. H. Eichhorn, for appellees.

DOWLING, J.—Appellants, claiming to be the owners of the petroleum, gas, and oil in and under certain lands in Wells county, and of certain oil wells on these lands, together with the exclusive right to drill for petroleum, gas, and oil, and to lay pipes to carry the same, brought this action

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to determine their said rights, and to quiet their title. Issues were formed upon the pleadings, and at the February term, 1896, of the Wells Circuit Court, the case was tried by a jury. At the request of the parties, a special verdict was returned. The appellants and the appellees, respectively, moved for judgment on the verdict. The court overruled the motion of appellees, and sustained that of appellants, and proper bench, docket, and order-book entries were made of such rulings. At that time, however, no judgment was entered of record by the clerk, and no minute or memorandum was made directing the entry of any such judgment, or announcing that a judgment was given by the court in favor of the appellants upon the special verdict, nor was there any written minute or evidence of the intention or desire of the court to render, or have entered, a judgment on said verdict, further than the minute and entry of the filing of said two motions, and the rulings in sustaining one of said motions, and overruling the other. At the same term of the court, appellees filed a motion and a bond for a new trial as of right, which motion was sustained over the objection and exception of the appellants, who afterwards obtained a bill of exceptions covering said ruling. At the September term, 1896, of said court, a second trial of said cause was had, resulting in a special verdict, followed by motions for judgment in favor of the parties respectively, and the rendition of judgment in favor of the appellees. At said latter term, the court, of its own motion, entered *nunc pro tunc* a judgment in favor of the appellants upon said first verdict, and as of the term at which said new trial as of right was granted to the appellees. On the day of the last named entry, and upon the motion of the appellees, the court altered and changed the bill of exceptions theretofore granted to the appellants upon the awarding of appellees' motion for a new trial as of right, so that instead of showing the failure and refusal of the court to render judgment in favor of appellants it was made to appear that, upon the overruling of appellees' motion for judg-

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ment upon said verdict, the court "rendered judgment upon the special verdict for the plaintiffs, and then and there audibly announced in open court to the counsel of both parties that the court then and there rendered, and would cause to be entered, a judgment upon said special verdict in favor of the plaintiffs, and was proceeding to make and making his minute upon the court docket, showing a judgment to be entered by the clerk of this court in favor of the plaintiffs upon said special verdict, when, upon the request of defendants' counsel, the formal entry of such judgment upon the minutes of the court docket was not fully completed by the court, in order to enable defendants' counsel to procure their clients to execute a bond for the purpose of securing a new trial as of right; and it being then and there understood by the counsel of both parties that the court had announced in open court that judgment was awarded to the plaintiffs, but its entry by the clerk temporarily suspended."

The most that can be said of the facts supporting the court's action in entering *nunc pro tunc* the judgment upon the first verdict is that an oral announcement was made by the court of its decision in favor of the appellants; that a minute would have been made of such decision, from which an entry of judgment would have been made by the clerk, but for the request of appellees' counsel to withhold such minute; and that, therefore, the action was taken alone from the memory of the oral announcement, without memorandum, and with purposed omission of memorandum. There can be no doubt that, for some purposes, the oral announcement of the court's conclusion or decision would be conclusive; as, for instance, to prevent a dismissal by the plaintiff. But as constituting a judgment which would preclude strangers, or supply the basis for its entry *nunc pro tunc*, there is serious doubt. It is the general rule that some memorandum must exist as written evidence of the action of the court to be entered. *Makepeace v. Lukens*, 27 Ind. 435; *Hamilton v. Burch*, 28 Ind. 233; *Uland v. Carter*, 34 Ind. 344;

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*Schoonover v. Reed*, 65 Ind. 313; *Williams v. Henderson*, 90 Ind. 577; *Kelley v. Adams*, 120 Ind. 340. A collection of decisions to this effect will be found in 12 Am. and Eng. Enc. of Law, p. 81. There having been no such evidence, the action of the court was not authorized. We do not, of course, disregard the rule that parol evidence is admissible upon such motions for a *nunc pro tunc* entry, but, as held in *Schoonover v. Reed*, *supra*, and other cases, it is admissible in connection with some minute of the court's action. Nor do we doubt that, at the time the *nunc pro tunc* entry was made, the judgment might have been ordered and entered for the first time. When it not only appears that no memorandum was made, but that it was purposely withheld at the instance of the party to be benefited by the proceeding, there was no authority to make the *nunc pro tunc* entry. While we do not pass upon the action of the court in changing the bill of exceptions to correspond with the entry of the judgment *nunc pro tunc*, the bill, made when the transaction was comparatively recent, was far better evidence of the action of the court at the time, than the memory of the witnesses at a much later period. Not only so, but the change was in direct contradiction of the original bill. More than this, the excuse stated for the failure to render the judgment on the special verdict on the 7th Saturday of the February term, 1896, is that the entry was temporarily suspended, "to enable defendants' counsel to procure their clients to execute a bond for the purpose of securing a new trial as of right;" and yet the record shows that such bond was filed, and was approved by the judge, March 21, 1896.

There having been no judgment at the time of granting to the appellees a new trial as of right, the appellants insist that such ruling was erroneous; and to that effect are the decisions. *Whitlock v. Vancleave*, 39 Ind. 511; *Hutchinson v. Lemcke*, 107 Ind. 121; *Stanley v. Dailey*, 112 Ind. 489; *Personette v. Cronkhite*, 140 Ind. 586.



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The statute authorizing new trials as a matter of right (section 1076 Burns 1894, section 1064 Horner 1897) provides that "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, \* \* \* and on the applicant giving an undertaking, \* \* \* shall vacate the judgment and grant a new trial." The cases cited have been decided—and correctly, we think—upon the theory that this statute gives the right only after judgment, for the reason that many steps may intervene before the rendition of the judgment to obviate the granting of a motion therefor.

Appellees' learned counsel insist that, by proceeding with the second trial, appellants waived the error of the court in granting the new trial. The cases cited in support of this proposition differ from this case in the fact that here the appellants reserved the question of the court's action, and the alteration of the bill of exceptions did not deprive them of their exception, but continued it in their favor. It cannot be said, where a new trial as of right is erroneously granted, that the adverse party, to take advantage of the error must not follow up the new trial, but must abandon further steps until the appeal. If this is correct, the same rule would apply to defeat most of the erroneous rulings of trial courts.

Appellees have assigned as cross-errors the rulings of the court on the demurrers to the several paragraphs of the complaint, and on the motions of appellants and appellees, respectively, for judgment on the first special verdict. The allegations of each paragraph of the complaint show that appellants have a valid, subsisting interest in the real estate described, and that the appellees either claim title to the property adversely to them, or wrongfully hold possession thereof. Under the statute, this is sufficient. The special verdict finds every fact necessary to entitle the plaintiffs to recover, and fully justifies the action of the court in sustaining appellants' motion for judgment, and in overruling the motion of appellees.

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The judgment is reversed, with instructions to proceed upon the first special verdict, and in disregard of the last trial.

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## SHULTZ v. BOYD ET AL.

[No. 18,594. Filed February 8, 1899.]

**ASSUMPSIT.**—*Payment to Wrong Person.*—*Life Insurance.*—An action cannot be maintained by the beneficiary of a life insurance policy against a third person to whom the amount due on the policy was paid, for the recovery of the amount paid, where it is not shown that defendant assumed to act for plaintiff in receiving the money, but collected same from the company upon a claim of right under an alleged assignment of the policy by the insured.

From the Wayne Circuit Court. *Affirmed.*

*John L. Rupe*, for appellant.

*Thomas J. Study*, for appellees.

**BAKER, J.**—Appellant's complaint discloses these facts: George W. Shultz on Nov. 1, 1889, procured a life insurance policy payable upon his death. The policy recites that the application is "a part of this contract". The application and the policy proper were made out upon a printed form. This form consisted of one folded sheet of paper containing blanks for both the application and the policy. In the application appears this question in printing: "Full name of the beneficiary for whom the insurance is desired?" In answer Shultz subscribed "To my legal heirs". In the printed form of policy a blank was left in which to write the name of the beneficiary. The blank was in this connection: The company "doth hereby promise to pay to — (the beneficiary under this policy) or to the legal representatives or assigns of said beneficiary, the sum of," etc. The company wrote in this blank the name of the insured "George W. Shultz". None of the printing was stricken out. Shultz received the policy in this condition and retained it till Feb. 20, 1890, and paid all premiums throughout. Shultz in-

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dorsed upon the policy: "February 20, 1890. I hereby transfer the within policy to [appellees], and such sums as may be due them to be paid first. George W. Shultz." On the day mentioned he delivered the indorsed policy to appellees as security for loans and advances. This was with the consent of the company, but without the knowledge or consent of appellant. Shultz died intestate in 1893, leaving appellant his sole heir. From issuance of policy to death of insured appellant was sole heir presumptive. At Shultz's death appellees held the policy as security for more than the amount thereof. They demanded of the company payment of the full amount as due them. The company paid. They applied the amount on the debt due them from Shultz. Appellant was in no way liable on the debt. She demanded of appellees that they pay her the amount they received from the company. They refused.

Demurrer to answer was carried to complaint and sustained. Judgment on appellant's refusal to plead further.

Appellant claims that the rules of construction establish that she is the beneficiary named (by class); that she acquired a vested right to receive the insurance money from the company; that the attempted assignment was ineffectual to divest her of the right; and that appellees, having received money that she alone rightfully could collect, must account.

If the first three propositions are true, the fourth does not necessarily follow. An actor must show (1) a right (2) infringed (3) by one owing a duty correlative to the right.

If it were granted that the complaint exhibits a right, in what has it been broken in upon and by whom? Appellant asserts that she alone had the right to collect the insurance money. From that right would flow the correlative duty of the company to pay her. To pay what? Not to pay specific money that had been identified, set apart, and held by the company as custodian; but to pay from the assets generally the amount due appellant as owner of the chose in action. It is not alleged that the company's assets are insufficient.

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Appellant's right has been infringed no more by the company's payment to appellees than it would have been by payment of the same amount to appellees or any one else upon another claim.

The complaint sets forth no duty of appellees correlated to appellant's alleged rights as sole beneficiary. They did not take from the company, with notice of appellant's rights, so much as to leave an execution ineffectual. They did not assume to act as her agents. They did not covenant with the company to take the money for her use. But they did assert a claim of right on their own account. If they obtained the money wrongfully, and if the law implies against them any promise or trust, it is not in favor of appellant. *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 450, 457; *Rowe v. Bank*, 51 N. Y. 674; *Peckham v. Van Wageningen*, 83 N. Y. 40; *Decker v. Saltzman*, 59 N. Y. 279; *Dumois v. Hill*, 37 N. Y. Supp. 1093; *Sergeant v. Stryker*, 1 Harr. (N. J.) 464; *Nolan v. Manton*, 46 N. J. L. 231; *Moore v. Moore*, 127 Mass. 22; *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982; *Rand v. Smallidge*, 130 Mass. 337; *Goreley v. Butler*, 147 Mass. 8, 12, 16 N. E. 734; *Hopkins v. Beebe*, 26 Pa. St. 85; *Town of Rushville v. President, etc.*, 39 Ill. App. 503; *Neill v. Chesson*, 15 Ill. App. 266, 270; *Hall v. Carpen*, 27 Ill. 385; *Crews v. Heard*, 7 Ga. 60; 7 Lawson's Rights, Remedies & Prac., section 3692; 2 Ency. Pl. & Pr. 1021.

The statements in *Lemans v. Wiley*, 92 Ind. 436; *McFadden v. Wilson*, 96 Ind. 253, and *Moore v. Shields*, 121 Ind. 267, if limited to the facts in those cases, are not inconsistent with this decision.

Judgment affirmed.

Jordan, J., absent.

Corbey v. Rogers.

CORBEY ET AL. v. ROGERS, JR.

[No. 18,786. Filed February 3, 1899.]

153	100
156	496
152	100
100	653

**APPEAL AND ERROR.**—*Motion to Strike Out Part of Pleading.*—*How Made Part of Record.*—A motion to strike out a part or all of a pleading can only be made a part of the record by bill of exceptions or order of court. p. 169.

**PLEADING.**—*Foreclosure of Mortgage.*—*Statute of Limitations.*—Where a complaint to foreclose a mortgage recites that a certain defendant claims some interest in the mortgaged property, but that if he has any interest it is subject to plaintiff's mortgage, such defendant cannot plead the statute of limitations, unless he alleges facts showing that he has an interest in the property. p. 170.

**SAME.**—*Facts in One Paragraph Not Made Part of Another by Reference.*—The facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. p. 172.

From the Vigo Circuit Court. *Affirmed.*

*I. N. Pierce* and *W. A. Kearns*, for appellants.

*G. W. Kleiser* and *J. H. Kleiser*, for appellee.

**MONKS, C. J.**—This action was brought by appellee against appellants to foreclose a mortgage. Appellant Corbey filed an answer in three paragraphs. A demurrer was sustained to the third paragraph. The cause was tried and judgment rendered foreclosing said mortgage against appellants.

The errors assigned by appellant Corbey and not waived by a failure to argue the same are: 1. "The court erred in sustaining the motion of appellee to strike out certain portions of the third paragraph of the separate answer of appellant Corbey. 2. The court erred in sustaining appellee's demurrer to the third paragraph of answer."

It is well settled that a motion to strike out a part, or all of a pleading, can only be made a part of the record by a bill of exceptions or order of court. *Dudley v. Pigg*, 149 Ind. 363, 369, and cases cited; *Aurora, etc., Ins. Co. v. Johnson*, 46 Ind. 315, 317, and cases cited. The clerk has copied into the

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transcript what purports to be a motion to strike out parts of the third paragraph of answer; this did not, however, make it a part of the record. *Dudley v. Pigg, supra; Aurora, etc., Ins. Co. v. Johnson, supra.* The clerk has also copied into the transcript a bill of exceptions duly signed by the judge, showing the filing of a motion to strike out parts of the third paragraph of answer, and that the same was sustained, but at the place in the bill of exceptions marked "here insert," where the clerk should have copied the motion to strike out, he has referred to the page of the transcript where the motion may be found. This did not make the motion a part of the record. *Aurora, etc., Ins. Co. v. Johnson, supra; Elliott's App. Proc., sections 818, 819.* The parts of the paragraph to which the motion referred are not in any way identified by the bill of exceptions. No question is presented, therefore, concerning the action of the court in sustaining said motion.

It is alleged in the complaint that one Claiborne Hedges executed the note and mortgage sued upon, Feb. 16, 1883, the note being payable thirty days after date; that said Hedges died intestate on Dec. 16, 1892, and left surviving him his widow, the appellant Ellen Hedges, and that no letters of administration have been granted on his estate, and "the defendant Corbey claims to have some interest in said estate, but if he has any interest it is subject to plaintiff's mortgage lien, and said defendant therefore is made a defendant to answer as to his interest so claimed." It is the rule in this State that such a complaint challenged the appellant Corbey to set up his claim, if any, superior to the mortgage, and on failure to do so he is precluded by the judgment and decree from ever after claiming any right in the mortgaged property superior to the mortgage so foreclosed. *O'Brien v. Moffitt*, 133 Ind. 660, 665-667, and cases cited; *Woollen v. Wishmier*, 70 Ind. 108, 110, 111; *Woodworth v. Zimmerman*, 92 Ind. 349; *Craighead v. Dalton*, 105 Ind. 72.

The third paragraph of the answer of the appellant Cor-

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bey, set up the ten years' statute of limitation as a bar to the foreclosure of said mortgage, but in no way set forth the interest he claimed in the real estate, or that he was a grantee or mortgagee of Hedges who executed the note and mortgage sued upon, or otherwise held under him, or that he owned or claimed any interest whatever in said real estate or any part thereof. The general rule is that the right to plead the statute of limitations is a personal privilege, but persons standing in the place of the party having the personal privilege, such grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such a defense. 1 Wood on Lim., pp. 96, 97; Buswell Lim. and Adv. Pos. 527; 13 Am. and Eng. Enc. of Law 709, 710; *Riser v. Snoddy, Adm.*, 7 Ind. 442, 445, 446; *Cole, Adm., v. Lafontaine*, 84 Ind. 446, 449; *Lord v. Morris*, 18 Cal. 482, 490, 491; *Grattan v. Wiggins*, 23 Cal. 16; *Baldwin v. Boyd*, 18 Neb. 444, 448, 449, 25 N. W. 580, and cases cited; *Mitcheltree v. Veach*, 31 Pa. St. 455; *Woodyard v. Polsley*, 14 W. Va. 211; *Werdenbaugh v. Reid*, 20 W. Va. 588, 589; *Smith v. Brown*, 99 N. C. 377, 6 S. E. 667; *Trimble v. Fariss*, 78 Ala. 260; *Steele v. Steele's Adm.*, 64 Ala. 438; *Dawson v. Callaway*, 18 Ga. 573, 585.

There may be cases where one owning real estate or an interest therein could set up the statute of limitations as a defense to an action to enforce a mortgage lien on such real estate, when he did not derive his title from or through such mortgagor. But this we need not determine, for it is clear, we think, that said third paragraph of answer was not sufficient because, as the complaint stood, it was incumbent on appellant, in addition to the allegation of the statute of limitations, to aver facts showing that he had such interest in the real estate described in the mortgage, as entitled him to the benefit of said statute of limitations, and no such facts are set forth in said paragraph. If the complaint had set up the facts showing that Corbey had an interest in said real estate

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and what that interest was, it would not have been necessary to set forth such facts in the third paragraph of answer. When, in a case like this, facts concerning the interest of a defendant in the real estate are not set forth in the complaint, he must set them up in his answer. *Mann v. State, ex rel.*, 116 Ind. 383.

It is true that an attempt is made in the third paragraph of answer to adopt and make the second paragraph of answer a part thereof by reference. It is settled, however, that facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. *Potter v. Earnest*, 45 Ind. 416, 418, and cases cited; *Mason v. Weston*, 29 Ind. 561. It not appearing from the facts alleged in the third paragraph of answer that appellant had or owned any interest in the mortgaged real estate, the court did not err in sustaining the demurrer thereto.

There is some controversy between counsel as to whether section 299 Burns 1894, section 298 Horner 1897, extending the limitation in case of the death of the person liable to an action before the expiration of the time limited for the commencement of the action, applies to this case. As the third paragraph of answer is insufficient for other reasons, it is not necessary to determine this question. Finding no error in the record the judgment is affirmed.

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*BASYE v. BASYE.*

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[No. 18,471. Filed February 14, 1899.]

**HUSBAND AND WIFE.—***Abuse of Confidential Relations.—Fraud.—Equitable Relief.*—Whenever the confidence resulting from a relationship of special trust, such as should exist between husband and wife, is abused, equity will afford relief. *p. 175.*

**SAME.—***Demonstrations of Love.—Promise as to Future Conduct.—Representation of Existing Fact.—Fraud.*—Professions and demonstrations of love and promises as to future conduct, when made by a wife to her husband, are representations concerning a present fact, and when falsely made to induce the husband to convey to her his real estate, fraud may be predicated thereon. *p. 175.*

152	172
153	16
154	172
155	427
156	63



*Basye v. Basye.***HUSBAND AND WIFE.—Conveyance to Wife.—Fraud.—Rescission.—**

Where a wife, who had treated her husband coldly for a long time without cause, suddenly became profuse in her professions and demonstrations of love, and thereby induced him to deed her certain real estate without consideration other than that the title should be in her as his wife and in trust for him, and that their marital relations, should continue peaceful and loving, after which she immediately abandoned him without cause and began suit for divorce, the conveyance should be set aside. . *pp. 173-176.*

**PLEADING.—Demurrer.—Abatement.**—The question as to whether an action should abate because the complaint shows another action for the same cause pending between the parties is not raised by a demurrer for want of facts. *Rose v. Rose*, 98 Ind. 179, in so far as it might be considered an authority to the contrary, is overruled. *p. 177.*

From the Henry Circuit Court. *Reversed.*

*John Lockridge* and *W. A. Brown*, for appellant.

*M. E. Forkner* and *Adolph Rogers*, for appellee.

**BAKER, J.**—Suit to cancel deed for fraud. The material averments of appellant's complaint are these: The parties are husband and wife and have been for twenty years; they owned by entireties certain land; there had been small differences between them, and appellee, without appellant's fault, had treated him coldly for a long time; appellant was a dutiful husband throughout; he was in love with his wife and she knew it; he desired to live with her in peace, concord, and affection; suddenly she became profuse in professions and demonstrations of love; she promised to be a dutiful and loving wife for the rest of their days; this conduct of hers was hypocrisy; in shamming she had in mind to defraud him by getting the title and then deserting him; with this intent and while making her false protestations and promises, she begged him to make her a deed, stating that the entire title ought to be in the wife and that he might put the consideration at \$2,200 which would always show his interest in the land; he was ignorant of her fraudulent design, and, relying on the apparent sincerity of her actions and promises, deeded her his interest without consideration other than that the title

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should be in her as his wife and in trust for him and that their marital relations should continue peaceful and loving; in a few days she abandoned him and filed her complaint for divorce which is yet pending untried; the charges in the complaint for divorce are untrue.

Demurrer to complaint for want of facts was sustained. Judgment on appellant's refusal to plead further.

Appellant cites no authorities and simply insists in a general way that the complaint states sufficient facts.

Appellee contends that the complaint is bad because it shows: first, that the deed was voluntary; second, that it was for a sufficient consideration; third, that there was no fraud; fourth, that the suit is between husband and wife concerning real estate; and fifth, that a divorce proceeding is pending in which alone the matters complained of can be adjudicated.

Though a voluntary conveyance is valid between the parties and parol evidence is inadmissible to impress a trust upon an absolute deed, equity affords relief against fraud in the procurement.

The \$2,200, which was to have been named in the deed, would have constituted a valuable consideration if paid; and appellant could not have proceeded without repaying or offering to repay the amount. But the complaint does not show that this sum was recited in the deed as a consideration, much less paid. It affirmatively appears that appellant executed the deed without consideration other than one he could not tender back.

Appellee cites *Fouty v. Fouty*, 34 Ind. 433; *Burt v. Bowles*, 69 Ind. 16; *Bethel v. Bethel*, 92 Ind. 318, 324, and other authorities, to the effect that fraudulent representations must relate to existing facts and that promises made to be performed in the future and afterwards broken do not constitute fraud. To permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise, a broken contract, would obscure elementary distinctions between remedies and tend to nullify the statute of frauds.

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In this case the false representations were made concerning a present fact. Representations may consist in acts as well as words. When appellee caressed her husband, after a long period of coldness, she made a solemn affirmation of present fact just as much as when she told him in words that she loved him and begged his forgiveness of her past indifference. When she caressed him and promised to be a good wife in the future, her promise as well as her kiss was a representation of present fact. A present state of mind is a present fact. Bigelow on Fraud (1888 ed.), pp. 483-4.

Appellee owed appellant the utmost good faith and frankness. There existed between them a relation of special confidence and trust. The principle, also, applies here that whenever the confidence resulting from such a relationship is abused equity will interfere. 2 Pom. Eq. Jur., section 963; Schouler Husb. & W., section 403; Bigelow on Fraud (1888 ed.), p. 353. It was a fraud on appellant for appellee to conceal her intention of abandoning him as soon as she got his property.

That the husband is usually the stronger may be true; but that he is not always the dominating force in the marriage union is known from many well authenticated instances extending from the present back to the time of Delilah. A few of these have gotten into the law books.

In *Evans v. Carrington*, 2 De Gex, F. & J. 481, the wife induced the husband to deed property to her, on the basis that it was her due under the marital relation. She intended, as soon as she could get possession, to leave and never to live with her husband again. The deed was annulled.

*Evans v. Edmunds*, 13 C. B. 777, is very similar in facts and result.

*Brison v. Brison*, 75 Cal. 525, 17 Pac. 689. The wife importuned the husband to put the title to his land in her name, stating that she would hold it for his benefit and reconvey it on demand. When she made the promise, she intended to

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hold the land as her own and to desert her husband. This was held to be active fraud.

*Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. 691, resembles the Brison case.

A quotation from *Turner v. Turner*, 44 Mo. 539, shows the nature of that case: "A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name. If it was done with an honest intent to secure a home for herself and her offspring, the transaction would not only be legal but praiseworthy. But if the influence was exerted with the design of despoiling the husband and then abandoning him, \* \* \* the law would condemn and stigmatize the transaction."

*Stone v. Wood*, 85 Ill. 603. Wood and his wife had lived in Galesburg. Wood went to Bloomington to work. His wife wrote him that if he would put the title to their Galesburg property in her name (by means of a trustee), she would sell it for \$1,800, pay his debts, and come to him with the balance; and they would buy a new home. She intended to cheat her husband, financially and maritally. After getting the deed, she conveyed to Stone, who knew of her fraud and held the property for her benefit. The court decreed that the defendants restore the title to plaintiff and account for rents.

In *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65, the wife had grown tired of her husband. But she wanted some of his property—unincumbered. So she simulated ardent affection, and he, under the spell of her allurements, conveyed to her a valuable property in Denver. Then she drove him from the house and applied for a divorce. His suit to regain the property was sustained.

The fourth claim of appellee is that this suit will not lie because it is between husband and wife concerning real estate. Married women have been emancipated by the statutes of this State. They must respond for frauds practiced upon their husbands as well as for those upon others.

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The final contention is that the complaint is bad because it shows that a divorce proceeding is pending. If a complaint states facts sufficient to constitute a cause of action, and also sets forth facts that make out a defense in bar, a demurrer for want of facts should be sustained. But the defense of a former action pending is not in bar. It is in abatement merely. If the complaint exhibits a ground for abatement, the demurrer should be framed and addressed accordingly. Section 342 Burns 1894, section 339 Horner, subdivision 3. The case of *Rose v. Rose*, 93 Ind. 179, 185, in so far as it might be considered an authority to the contrary, is overruled.

What would have been the effect of a decree of divorce in appellee's favor rendered before the commencement of this suit, is not involved.

The demurrer for want of facts should have been overruled.

Judgment reversed.

MAGNUSON v. BILLINGS.

[No. 18,874. Filed February 15, 1899.]

COURTS.—*Rules for Conduct of Business*.—Courts have power to adopt rules for conducting the business therein, not repugnant to the laws of this State, and when adopted they have the force and effect of law, and cannot be dispensed with in a particular case. p. 180.

PLEADING.—*Argumentative Denial*.—Defendant filed an answer to a complaint in an action to foreclose a chattel mortgage securing a purchase-money note, charging that he was induced to buy the property by the fraudulent representations of plaintiff, and as soon as he discovered the fraud he returned the property and demanded his note, which plaintiff refused to surrender. Plaintiff filed a reply alleging that defendant returned the property in a damaged condition, without notice to her of his intention to rescind the contract, and that she had never accepted a return of the property. *Held*, that the reply was merely an argumentative denial. pp. 178-181.

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155	20
152	177
165	671

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**COURTS.—Rules for Conduct of Business.—Pleading.—Argumentative Denial.**—The action of the court in permitting plaintiff to file an additional paragraph of reply after the issues were closed, contrary to a rule of court is not reversible error, where the pleading amounted merely to an argumentative denial, and all the evidence under it was admissible under the general denial. *p. 181.*

**CONTINUANCE.—Discretion of Court.**—No error was committed in overruling defendant's motion for a continuance upon the ground that he was not prepared to produce the evidence to refute new facts brought into the case by a paragraph of reply, filed by plaintiff after the issues were closed, and on the day of trial, where all the material facts pleaded in such reply were in issue by the general denial. *pp. 181, 182.*

From the Noble Circuit Court. *Affirmed.*

*L. W. Welker*, for appellant.

*F. P. Bothwell* and *Ferrall & Hanan*, for appellee.

**HADLEY, J.**—On the 26th day of January, 1896, appellee filed her complaint against the appellant, praying judgment on a note, and foreclosure of a chattel mortgage executed to secure the same. On the 6th day of January, 1897, appellant filed his answer in five paragraphs. On the 3rd day of March, 1897, appellee filed her reply in general denial, which placed the cause at issue. On the 17th day of May, 1897, the court set the cause for trial on the 25th day of May, 1897, and on the day set, and after the cause was called for trial, appellee moved the court for leave to file "an additional and second paragraph" of reply to the second paragraph of appellant's answer. Appellant resisted the motion upon the ground that the issues were closed, and appellee had not complied with rule five of the court, which required applications to open issues to be supported by the affidavit of the applicant, and upon the further ground that the proposed further reply set up new matter, that would require new and additional evidence, which he was not prepared to present. The motion was sustained, a proper exception awarded appellant, the additional reply filed, cause tried, and resulted in a judgment and decree for appellee. The overruling of appellant's mo-

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tion for a new trial presents the only question for review here.

The second paragraph of answer charged that the note and mortgage were given for a stallion, cart, and harness, that the defendant was induced to buy the property by the fraudulent representations of the plaintiff; that soon after the defendant discovered the fraud he returned the property to the plaintiff, informing her that it was not as she had represented it to be, "and was worthless, and that he had brought the stallion, cart, and harness back, and the plaintiff directed him to place the stallion in her barn, and the cart and harness in the shed, which the defendant did as requested, and then demanded of the plaintiff a return of his note and mortgage, which she refused."

The additional and second paragraph of reply to the answer stated that the property was purchased by, and delivered to the defendant on the — of May, 1896, and that the property was then in good condition; that the defendant kept and used said property until the 20th day of July, 1896; that he worked the horse all the time, and negligently failed to feed and care for him so that said horse became very poor and weak, and negligently permitted the collar used on the horse to rub, wear, and create great and painful sores on his neck and shoulders, and failed to treat said sores, and they made ugly scars on the horse to her damage fifty dollars, and did use, wear out and damage said cart and harness twenty dollars, and on the 20th day of July brought said property, in its damaged condition, to the plaintiff's house, and left the same on her premises, without her knowledge or consent, and without notice to her of his intention to rescind the contract, and the plaintiff has never accepted a return of the property, or taken possession of it.

The fifth rule of said court is properly in the record, and is in the words following: "In all cases where issues are, or may be completed, motion for leave to re-open the issues, and file an additional pleading, must be upon the affidavit of the

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party making application, or his attorney, showing some reasonable excuse for not filing such pleading before issue joined, and that the facts set out in said pleading are believed to be true, and he believes the same can be sustained on the trial of the cause by proof. Such affidavit and motion must be accompanied by the pleading proposed to be filed, or the same will not be entertained." The first reason assigned for a new trial is that the court erred in sustaining appellee's motion for leave to file her second paragraph of reply to the second paragraph of answer, without a compliance with the court's rule five.

Courts have power to adopt rules for conducting the business therein not repugnant to the laws of this State (section 1375 Burns 1894, section 1323 Horner 1897), and when adopted and published they have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it. Section 186, Elliott's Gen. Prac.; *Lancaster v. Waukegan, etc., R. Co.*, 132 Ill. 492, 24 N. E. 629; *David v. Aetna Ins. Co.*, 9 Iowa 45; *Pratt v. Pratt*, 157 Mass. 503, 505, 32 N. E. 747, 21 L. R. A. 97; *Rout v. Ninde*, 111 Ind. 597. So long as a rule of court remains unrepealed, it cannot be dispensed with in a particular case. *Thompson v. Hatch*, 20 Mass. 512-516; *Coyote, etc., Co. v. Ruble*, 9 Ore. 121; *Ogden v. Robertson*, 15 N. J. L. 124; *Quynn v. Brook*, 22 Md. 288; *State v. Edwards*, 110 N. C. 511, 14 S. E. 741.

A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business. Furthermore, a rule adopted by a court is something more than a rule of the presiding judge; it is a judicial act, and when taken by a court, and entered of record, becomes a law of procedure therein, in all matters to which it relates, until rescinded or modified by the court. *Treischel v. Mc-*



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*Gill*, 28 Ill. App. 68; *Shane v. McNeill*, 76 Iowa 459, 41 N. W. 166.

In this case it is conceded that the issues were closed at the time application was made by appellee to file an additional reply, and there is no pretense that the application was accompanied by an affidavit of the applicant, or her attorney, showing some reasonable excuse for not filing such pleading before issue joined, and that she believed said answer to be true and capable of proof upon the trial. Rule five was a law of the court providing that an affidavit disclosing certain facts should constitute the condition upon which the court would exercise its discretion with respect to re-opening the issues, and the court had no power to waive it, and it follows that appellee's motion should have been overruled.

But the additional and second reply was an argumentative denial and all evidence under it was admissible under the general denial pleaded in the first paragraph of reply. Hence the defendant was not damaged, and the action of the court in permitting it to be filed, was harmless, and not reversible error. *Columbus, etc., R. Co. v. Braden*, 110 Ind. 558; *Board, etc., v. Huff*, 91 Ind. 333; *Gheens v. Golden*, 90 Ind. 427; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Hervey v. Parry*, 82 Ind. 263.

Upon filing the second paragraph of reply the appellant moved the court for a continuance of the cause, upon the ground that he was not prepared to produce the evidence to refute the new facts brought into the case by said second paragraph of reply, which motion was supported by the defendant's affidavit in denial of the facts pleaded, his present unpreparedness, and belief that he would be able to produce the witnesses at the next term of court. The motion for continuance was overruled, and this action of the court is called in question by the second reason assigned for a new trial.

All the material facts pleaded in the second paragraph of reply were in issue under the general denial of the first paragraph, and the second paragraph neither enlarged nor lim-

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ited the scope of the evidence and the action of the court was but a reasonable exercise of discretion. There was no error in overruling the motion for continuance. There are other questions reserved, but as they are not discussed in appellant's brief, they are deemed to be waived.

The motion for new trial was properly overruled.

Judgment affirmed.

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STARK v. BINDLEY.

[No. 18,517. Filed February 16, 1899.]

**MALICIOUS PROSECUTION.**—*Termination of Prosecution.*—Where a person was recognized to appear before the circuit court at the November term thereof to answer to the charge of larceny, and the grand jury at the September term of court investigated the charges against accused, and indorsed on the papers, certified to the circuit court by the justice of the peace, the word "Ignoramus," such action will not amount to a termination of the prosecution. *pp. 183-186.*

**SAME.**—*Termination of Prosecution.*—An action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of the defendant therein. *p. 186.*

From the Clay Circuit Court. *Affirmed.*

*A. W. Knight, T. W. Harper, A. J. Kelley and Samuel R. Hamill, for appellant.*

*George A. Knight, I. N. Pierce and Lamb & Beasley, for appellee.*

**MONKS, C. J.**—Appellant brought this action against appellee to recover damages for an alleged malicious prosecution. Appellant's demurrer to the second paragraph of answer was overruled and, refusing to plead further, judgment was rendered on demurrer in favor of appellee. The only error assigned calls in question the action of the court in overruling the demurrer to the second paragraph of answer.

The allegations of the second paragraph of answer are substantially as follows: That on September 21, 1891, appellee filed an affidavit before a justice of the peace, charging

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appellant with the crime of larceny. Appellant was arrested and had a preliminary examination on said charge before the justice on September 22, 1891, and on said day was held by said justice to answer to said charge of larceny, and required to give her recognizance to appear at the November term, 1891, of the Vigo Circuit Court to answer said charge. Failing to give said recognizance she was committed to jail until September 25, 1891, when she gave recognizance as required by said commitment, to appear and answer said charge at the November term, 1891, of the Vigo Circuit Court, and was discharged from jail. The September term 1891 of the Vigo Circuit Court was in session when said affidavit was filed, at the time the hearing was had and at the time appellant entered into her recognizance, and continued in session until November 14, 1891. The grand jury for the September term of said court was in session after appellant had been recognized to appear at the November term of said court and took up the investigation of said charge against appellant and had the papers certified to said court by said justice of the peace. On October 19, 1891, the grand jury, at said September term returned said papers to the clerk of the court, with the word "Ignoramus" indorsed thereon, and signed by the foreman of said grand jury; there was no order, judgment, or entry of said court made or entered of record discharging appellant from custody, or releasing her from the recognizance to appear at the November term of said court to answer said charge. There was no other or further proceeding of any kind had or taken respecting said charge against appellant by the Vigo Circuit Court, or by the grand jury, at any time thereafter, and there was no record made of the return of "Ignoramus" by the grand jury. This action was commenced and was pending before the commencement of the November term 1891 of said court.

The question presented is, was the criminal prosecution against appellant terminated, or at an end, within the meaning of the law, when this action was brought? If it was, the

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court erred in overruling appellant's demurrer to the second paragraph of answer, and the judgment should be reversed, otherwise the judgment should be affirmed.

It is first insisted by appellee that the return of "Ignoramus" by the grand jury was not a legal termination of said cause until a judgment was rendered thereon by the circuit court discharging appellant's bond, and releasing her from the duty of further appearing to answer the charge preferred against her by appellee. For a full discussion of this question see note to *Ross v. Hixon*, 46 Kan. 550, 26 Am. St. 123, 135, 137. It is not necessary to determine whether a judgment of discharge is necessary upon a return of "Ignoramus" to legally terminate such prosecution, for the reason that, even if such judgment is not necessary, the return set forth did not terminate said prosecution. The justice of the peace in requiring, and appellant in giving, her recognizance to appear and answer said charge of larceny at the November term of the Vigo Circuit Court merely complied with the provisions of section 1703 Burns 1894, section 1634 Horner 1897. Where the person held to answer a charge of felony by the justice of the peace gives a recognizance to appear at the next term of the circuit court, as the appellant did, it is the duty of the clerk to docket the case for the term at which such person has given bond to appear. If the grand jury at the September term of said court had returned an indictment charging her with the same larceny for which she was held to answer by the justice of the peace, said recognizance could not have been forfeited for a failure to appear at said term, because the condition thereof did not require her to appear at said term but at the November term. Section 1790 Burns 1894, section 1721 Horner 1897. To have given the said court jurisdiction over the person of appellant at the September term, if indicted at that term, it would have been necessary to issue a bench warrant on said indictment, and cause her arrest thereon, when she could have given a recognizance to answer said indictment or in default thereof been

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committed to jail. It is true that the grand jury at the September term had jurisdiction to investigate said larceny, and it was their duty to do so, but this was by virtue of the fifth clause of section 1735 Burns 1894, section 1666 Horner 1897, which provides that the grand jury must inquire "into violations of the criminal laws of this State generally of which the court has jurisdiction," and not under the second clause of said section. The second clause only applies to cases where the person is under bail to appear and answer at the term the grand jury is impaneled. As appellant's recognizance did not require her to appear at the September term of said court the grand jury at the September term had no jurisdiction to investigate said alleged offense by virtue of said proceeding instituted by appellee against appellant before the justice of the peace, a transcript of which and all papers were filed with the clerk of said court. The indorsement of "Ignoramus" on the papers of said cause was a nullity. Said grand jury had no authority to act upon the transcript and papers in said cause, and said court had no jurisdiction over the person of appellant at said time, on account thereof, for the reason that the proceeding was not pending at said term, but was for the November term of said court. If at the November term of the Vigo Circuit Court the grand jury had returned an indictment against appellant for the larceny charged in appellee's affidavit, she could have been required by the court to appear and plead thereto, and on failure to do so her recognizance could have been forfeited, notwithstanding said return of "Ignoramus" at the September term. This is true because the condition of her recognizance required her to appear and answer said charge at said November term. If appellant had not given a recognizance for her appearance, but had been in jail on said charge awaiting the action of the grand jury thereon, when the return of "Ignoramus" was made upon the papers in said cause by the grand jury, the grand jury and court would have had jurisdiction, and a judgment of the court on said return discharg-

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ing appellant from custody would have been a legal termination of the proceeding instituted by appellee. The return of "Ignoramus" did not therefore terminate the prosecution instituted by appellee against appellant, and the same was not at an end when this action was commenced. It is settled law that an action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of the defendant therein. *McCullough v. Rice*, 59 Ind. 580, and cases cited; *Gorrell v. Snow*, 31 Ind. 215; *Hays v. Blizzard*, 30 Ind. 457, 458; *Steel v. Williams*, 18 Ind. 161, 163, 164; *Lytton v. Baird*, 95 Ind. 349, 361; *Cottrell v. Cottrell*, 126 Ind. 181, 182.

It follows that the court did not err in overruling the demurrer to the second paragraph of answer.

Judgment affirmed.

### GRAHAM v. RUSSELL, AUDITOR.

[No. 18,859. Filed February 17, 1899.]

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166 636

**TAXATION.—Setting Aside Final Settlement of Decedent's Estate to Collect Taxes.—Power of County Auditor.**—A county auditor, as the instrument or agency of the State, under section 8560 Burns 1894, is authorized to petition the court and secure a final settlement of a decedent's estate to be set aside so that taxes evaded by decedent may be collected. *pp. 190-193.*

**SAME.—Reopening of Decedent's Estate to Collect Taxes.**—Ignorance of the executrix that her testator had failed to list and return all his property for taxation will not defeat the setting aside of the final settlement report in order to subject the estate to the payment of taxes for which decedent was liable. *p. 194.*

**DECEDENTS' ESTATES.—Filing of Claims.—Taxes.**—The State is not required to file for payment its claim for taxes against a decedent's estate. *pp. 194, 195.*

**TAXATION.—Petition of Auditor on Behalf of State to Set Aside Final Settlement Report of Decedent's Estate.—Sufficiency Of.**—Where a county auditor petitions the court to set aside the final settlement report in a decedent's estate in order that the property of the estate may be subject to the payment of delinquent taxes, the petition need not contain averments that the petitioner did not appear at the final settlement and that he was not personally summoned to attend. *p. 195.*

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From the Daviess Circuit Court. *Affirmed.*

*W. Heffernan, E. Mattingly, Arnold J. Padgett and J. Alvin Padgett*, for appellant.

*J. H. O'Neill and W. F. Hoffmann*, for appellee.

JORDAN, J.—Appellee, as the auditor of Daviess county, filed his petition in the lower court on October 4, 1897, whereby he sought to have the final settlement of the estate of Richard C. Graham, deceased, set aside and said estate reopened for further administration in order that certain taxes due from said estate to the State of Indiana, for state and county purposes, might be collected out of the assets of said estate. The petition was filed after the term of court at which the final settlement was approved and the action is apparently based upon section 2403 R. S. 1881, section 2558 Burns 1894, section 2403 Horner 1897, wherein it is provided that a final settlement may be set aside and reopened at any time within three years for illegality, fraud, or mistake in such settlement or in the proper proceedings thereof by any person interested in the estate who did not appear at such final settlement and was not summoned to attend the same. Appellant unsuccessfully demurred to the petition on the grounds: (1) That the plaintiff had not the legal capacity to sue; (2) insufficiency of facts; (3) misjoinder of cause of action.

There was an answer in denial, and, upon the trial, the court made a special finding of facts and stated its conclusions of law thereon in favor of appellee, and rendered a judgment setting aside the final settlement made by appellant as the executrix of said estate, and ordered that the estate and the administration thereof be opened and reinstated upon the docket of said court, and that the plaintiff recover his cost.

The errors assigned relate to the overruling of the demurrer to the petition, and to the exceptions to the court's conclusions of law on its special finding of facts. The petition

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discloses that appellee is, and has been for more than two years prior to the commencement of the action, the auditor of Daviess county, Indiana, and it further sets forth his duties under the tax law relative to property subject to taxation which the owner thereof has omitted to return for that purpose. The pleading then proceeds to show, among other things, substantially the following facts: Richard C. Graham was at and prior to his death a citizen and resident taxpayer of the city of Washington, Daviess county, Indiana, and had been for a period of over twenty years. During all of said period he was the owner of a large amount of real and personal property situated in said county, his said personal property consisting of money on hand and on deposit in the banks, and of money loaned by him and of rights, bonds, and credits, etc. The moneys which he had on hand, and also the amounts of money which he had loaned out and the amounts which he had on deposit, were unknown to the several township assessors who called upon him from year to year during the aforesaid period to assess him. Graham, as the petition charges, neglected, failed, and omitted, for the year of 1881 and for each succeeding year thereafter including the year 1895, to list and return for taxation all of his said property, but listed and returned only a small portion thereof, although he was, during each of said years, duly called upon for that purpose between the first day of April and the first day of June, by the proper township assessor of the township in which he resided. It is charged that the fair cash value of the property which said Graham neglected and omitted to list and return for taxation for each of said years was \$10,000 and over, and for several of the years in question, it is alleged, he omitted to list and return property to the amount and value of \$25,000, all of which omission was unknown to the said assessors, and was by the said Graham concealed from said officials.

The property omitted during each of the years in question is alleged to have consisted of money on hand and on deposit



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in bank, and money loaned, and bonds of the said city of Washington, and other obligations, all subject to taxation and held and owned by Graham on the 1st day of April of each of said years. It is also averred that just prior to the 1st day of April of each of the years mentioned he would temporarily convert \$10,000 and over of his money into greenbacks in order to evade assessment and the payment of taxes thereon, and fraudulently concealed said fact of conversion from the assessor who called upon him to list his property, and fraudulently failed to list or return said amount or any part thereof for taxation.

Graham, it is averred, died testate at said county on July 29, 1895, leaving a liability for taxation due against his estate for State and county purposes to the amount of \$3,000 on account of his failure to list and return all of his property for taxation as aforesaid charged, for which amount said estate, it is averred, is still indebted. On August 12, 1895, his last will and testament was duly probated in the Daviess Circuit Court, and appellant, his surviving widow, was duly appointed thereunder and qualified as the executrix of his said will and assumed the administration of his said estate. Under his will, she was given all of his real and personal property of every description held and owned by the testator at the time of his death, and the same was turned over, under the will, to appellant, and is now held by her.

It is further charged that appellant, as said executrix, never filed in said court, nor with the clerk thereof, any inventory whatever of the personal property left by said decedent or testator, and omitted and neglected to file such inventory for the fraudulent purpose of concealing the personal estate of her said husband, and for the fraudulent purpose of preventing the proper tax officials of said county, whose duty it was to assess omitted property, from discharging said duty.

Immediately after the expiration of one year from the time of her appointment by the court as executrix, to wit, on August 27, 1896, she filed her report in said court for final

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settlement and the clerk thereof fixed October 5, 1896, for the hearing of the same and gave the usual notice provided by law to the heirs and creditors of the time and place fixed by him for hearing said report. At the time fixed for hearing the report no one offered any objections thereto, and the court approved it and discharged said executrix from the further administration of said estate; and it is further averred that at no time during the pendency of said estate in court was there any paper or statement made or filed by said executrix showing the personal property left by the testator at the time of his death.

Appellee, prior to June 1, 1897, had no knowledge or information that said decedent had omitted to list and return for taxation the property in question, and, it is averred, that the first information he received of that fact was on said 1st day of June, 1897, and that thereupon he immediately proceeded to take the necessary steps to have appellant appear before him to be examined, under oath, touching the amount of money, notes, and bonds held by said testator at his death; but after she was served with the proper notice to appear, she failed and refused to do so or submit to such examination. It is further alleged that no administration of said estate is now pending in any court of this State and that appellant still resides in the said county of Daviess. The prayer is that the matters and things set forth in the petition be inquired into and, if found to be true, that the final settlement of the estate be set aside, etc.

It is insisted by counsel for appellant that appellee, as county auditor, cannot maintain this action for the following reasons: (1) The facts do not disclose that he has such an interest in the estate as would authorize him, in contemplation of the statute upon which the action is founded, to file a petition for the purpose which he has; (2) that the facts alleged are not sufficient to warrant the court in awarding him any relief.

We will consider these in their order. Section 8560 Burns

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1894, section 6409 Horner 1897, of the law relative to taxation, being section 142 of the tax statutes of 1891, empowers the county auditor, upon notice to a taxpayer, to add, for any year or number of years, omitted property to the tax duplicate with the proper valuation thereon and to charge such property to the owner thereof with the taxes thereon. The powers granted to the county auditor under the section mentioned are not limited alone to that official, but the tax law also extends such powers to the county treasurer and the county assessor and boards of review. The tax law intends and has so declared in no uncertain terms that all property liable to taxation shall be charged with that burden and that none shall escape through the fraud or omission of the owner or holder thereof, and it is made the imperative duty, under the law, of every taxpayer to list and return for taxation all personal property of every description owned and held by him on the 1st day of April of each year legally liable to taxation. The provisions of the law, to which we have referred, granting the powers mentioned to the county auditor and other officials, are intended to afford an instrumentality or agency through which the State, as far as possible, can prevent property subject to taxation from escaping the burdens or charge imposed by the law. *Saint, Treas., v. Welsh, Ex.*, 141 Ind. 382; *Reynolds, Aud., v. Bowen, Adm.*, 138 Ind. 434.

It was held in the latter case that the power to assess property is a summary one, and that in order to secure uniform and just taxation, which the law intends, and to protect the State's revenue against a dishonest evasion of the law, and also to protect the honest taxpayer, it is necessary that tax laws be liberally interpreted in aid of the taxing power. The right of the county auditor and the other officials who in like manner are empowered and charged with the duty to see that omitted property is subjected to taxation, is a continuing one against each and every taxpayer, and it is not terminated with the death of the latter, but proceedings in discharge of such duty can be maintained against his estate after his death,

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and the notice required by the law may be served upon his administrator or executor. *Reynolds v. Bowen, supra; Saint v. Welsh, supra.*

Neither the taxpayer nor his estate after his death can claim any vested rights in the fruits of his fraud or omission to list and return all of his property liable to taxation, and the law, when properly invoked, will not permit either to profit thereby. Charged and empowered by the State with this duty, appellee, as county auditor, certainly cannot be considered, under the facts, in the eye of the law, as a stranger to the estate in question, and as one having no interest therein. Conceding that the court's order of final settlement, as insisted by counsel for appellant, stood as a bar against appellee taking any proceedings against Graham's estate to secure the taxes in controversy, certainly then he was interested in having such final settlement set aside in order that he might proceed to discharge the duties imposed upon him by the law. Appellee was, at least, interested on behalf of the State, which he, under the law, represented as one of its instrumentalities in seeing that the taxes, which had accrued by reason of the omitted property, should be paid by the estate of the defaulting decedent.

The right which he seeks to maintain by this action, under the circumstances, is but incidental to the general power or right with which he is invested by the legislature in respect to the assessment of taxes on omitted property. The estate in question, it appears, had been finally settled and its assets turned over to appellant, leaving the matter in regard to the taxes now in controversy still virtually pending unsettled as a liability for which the estate should account. That appellee, as the instrument or agency of the State, is authorized by the statute to petition the court and secure the final settlement to be set aside upon a showing of sufficient facts, so far as it affects him adversely, in the discharge of his duties as such, we think there can be no doubt. The case of *Bowen*

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v. *Stewart*, 128 Ind. 507, asserts principles which support this holding.

Taxes which are assessed or imposed under the authority of the State for governmental purposes, either for the State direct or for some of its subdivisions, in a legal sense may be said to be the property of the State, and the latter is certainly interested in their collection. Therefore, if the order of final settlement in question is, as claimed by counsel for appellant, a bar to appellee in the discharge of the duties with which he is invested relative to the taxation of omitted property, it must follow that his right to institute and maintain this action, under the circumstances, cannot be successfully denied, and the steps which he has taken in the matter, in his capacity as county auditor, must, in legal contemplation, be deemed to be those of the State, and the action may be viewed as though it had been instituted in the name of the State upon the relation of appellee as county auditor, which is certainly a proper procedure.

The contention of appellant's counsel, that the petition ought to have alleged that the taxes in dispute had been filed as a claim against Graham's estate prior to its final settlement, is without merit. The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of \$3,000 and over, which had accrued and were due for State, county, and township purposes.

Taxes are not such claims which the law of this State either requires or intends shall be filed for payment against a decedent's estate. It is true that taxes, in the order prescribed by the statute for the payment of liabilities of a decedent's estate, come within the fourth provision of such order of payment. Section 2378 R. S. 1881, section 2534 Burns 1894, section 2378 Horner 1897. The duty, how-

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ever, rests upon the administrator or executor to pay the taxes due against the estate without their being filed or presented for payment. Section 8587 Burns 1894, section 6436 Horner 1897; *Ring v. Ewing*, 47 Ind. 246; *Henderson v. Whitinger*, 56 Ind. 131.

It may be true that appellant, as insisted by her counsel, was, at the time she made her final report, ignorant of the acts of her testator in failing to list and return all his property for taxation, but this fact, under the circumstances, can not avail her to defeat the setting aside of the final report, or prevent the estate, which she represents, from being subjected to the payment of the taxes for which the decedent was justly liable. He, while in life, owed as one of the highest duties to the government, the duty to pay all taxes imposed upon his property liable to taxation. As a compensation for the discharge of this duty, the State afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed; and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. With or without knowledge of the existence of this liability of her decedent, it existed all the same against the property of his estate until paid, unless barred by some provision of law. *Beard v. Allen*, 141 Ind. 243.

With this charge or liability against the estate, she, immediately after the expiration of the year allowed by law, procured it to be declared by the court as finally settled, and secured her discharge from further administration of her trust.

It has been held by this court that, under the present statutes relating to the settlement of a decedent's estate, the fact that a claim was pending against an estate undisposed of at the time of the final settlement, constitutes such illegality as will, on the petition of the claimant, filed within the prescribed time, result in setting aside such final settlement. *Dillman v. Barber*, 114 Ind. 403.

A tax claim or charge, as we have seen, is not required to

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be filed against an estate, but it must be taken notice of by an administrator or executor and paid without being filed, and if he proceeds to finally settle the estate without the payment of such tax claim, settled or determined by proper adjudication in court, he does so at the peril of having such final settlement set aside, under the statute in question, at the instance of some one entitled to institute an action for that purpose. We do not place much stress upon the question of fraud imputed to appellant by the averments in the petition, for the reason, we think that the fact alone that she is shown to have filed a petition for final settlement and secured its approval by the court when the claim or liability now in dispute existed and was virtually pending against the estate undisposed of, must be considered such illegality, within the meaning of section 2558 Burns 1894, section 2403 Horner 1897, as will result in setting aside the final settlement and re-opening the estate for the purpose contemplated by the appellee.

It is further insisted that the petition is insufficient for the reason that it is not averred therein that appellee did not appear at the final settlement, nor was he personally summoned to attend the same. It is true that this court has held that in order to make a petition sufficient, under the statute, to set aside a final report after the term of court at which the same was approved, in a case where an ordinary individual or person is the petitioner, it must be shown by the averments of the pleading that the petitioner was not personally served with the process of the court to attend the hearing of the final report, and if not so served, that he did not attend the hearing thereof as a party thereto. *Dillman v. Barber*, 114 Ind. 403; *Williams v. Williams*, 125 Ind. 156. But where, as in this case, the State, through the county auditor, may be said to be the petitioner, the rule asserted by this court under the provisions of section 2558, 2403, *supra*, is not applicable. The reasons for this assertion are obvious. The county auditor is a public officer invested, under the law, with cer-

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tain duties and powers, among which, as we have seen, are those in regard to the taxation of omitted property. In no sense can it be said that he, as such official, is the owner of the taxes arising out of assessment upon property which, in the discharge of his duties, he secures to be placed upon the tax duplicate, for such taxes, as we have heretofore said, are considered in law as belonging to the State, and the auditor is invested with no power or rights in any manner to cancel or release the claim of the State for such taxes. The State, as the sovereign power is the real party in interest, and not the county auditor. The latter has no authority, under existing laws, to attend a final settlement of a decedent's estate on behalf of the State, nor can he be legally summoned by the administrator or executor to attend the hearing upon a final settlement, and his presence at such hearing could in no manner bind the State. It is equally clear that an administrator or executor cannot, under the law as it now exists, invoke the process of the court as against the State and thereby compel it to attend a proceeding for a final settlement of the estate which he represents, and therein litigate a question that may arise upon such settlement relative to an unpaid claim for taxes. *Snodgrass v. Morris, Aud.*, 123 Ind. 425.

It is a well settled rule and one of universal application that the State, in its sovereign capacity, can be sued only by its own permission, and then only in the manner, by which it has consented to be sued. The State of Indiana has not, under any statute, consented that an administrator or executor of an estate may bring it into court and thereby force it to become a litigant at the hearing of a final report in respect to a claim for taxes against such estate. It is evident, under the circumstances, we think, that inasmuch as the county auditor was not authorized to appear at the final settlement made by appellant, and thereby bind the State, and as the latter, in the absence of a statute granting such authority, could not be summoned to attend the hearing of the final



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report made by appellant, therefore the averments in the petition in respect to these matters are not essential, and their absence does not render the pleading insufficient as in other cases. Such averments, under the circumstances, could serve no essential purpose, for the evident reason that the matters or facts pertaining to such questions would not be open to inquiry or investigation upon the hearing of a petition presented on behalf of the State to set aside, as in this case, an order approving a final report.

It follows from what we have said that the petition is sufficient, and the court therefore did not err in overruling the demurrer thereto. The facts set out in the special finding are substantially the same as those alleged in the petition, and the court's conclusions of law thereon are correct, and the judgment below is therefore affirmed.

INDIANA MUTUAL BUILDING AND LOAN ASSOCIATION  
v. PLANK ET AL.

[No. 18,423. Filed February 21, 1899.]

152	197
152	502
152	197
166	502

**PLEADING.—Exhibit.**—When the allegations of a pleading vary from the provisions of the instrument which is the foundation of the action, the provisions of the instrument control; but where the exhibit is not the foundation of the action it cannot be considered in determining the sufficiency of the pleading, but must be disregarded. *p. 198.*

**SAME.—Exhibit.—Mortgages.—Foreclosure.—Building and Loan Associations.**—A suit by a building and loan association to foreclose a mortgage and enforce a lien on the shares of stock assigned by the mortgagor in the note and mortgage as collateral security, is not an action on the certificate of stock within the meaning of section 365 Burns 1894, requiring a copy of the written instrument to be filed with the pleading, and such certificate filed with the complaint will be disregarded in determining the sufficiency of the complaint. *p. 199.*

From the Fulton Circuit Court. *Reversed.*

*McBride & Denny* and *Essick & Metzler*, for appellant.

*Holman & Stephenson*, for appellees.

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MONKS, C. J.—This action was brought by appellant against appellees to recover judgment upon a note executed by them, to foreclose a mortgage executed by appellees to secure said note, and to enforce a lien on eleven shares of stock of appellant corporation pledged as collateral security to secure said note. A demurrer for want of facts was sustained to the complaint, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The ruling of the court upon said demurrer is the only error assigned.

It is not claimed by appellees that the complaint, when considered in connection with the note and mortgage filed therewith as exhibits, is insufficient; they insist however that the provisions of said certificate of stock filed as an exhibit control the allegations in the complaint, and that when said certificate is considered in connection with the other exhibits as a part of the complaint it is not sufficient, and the court did not err in sustaining the demurrer thereto.

It is true, as insisted by appellees, that when the allegations of a pleading vary from the provisions of the instrument which is the foundation of the action, the provisions of said instrument control, and such allegations will be disregarded. *Harrison, etc., Co., v. Lackey*, 149 Ind. 10, 14, and cases cited. If however an exhibit is filed with a pleading which is not the foundation thereof, the same cannot be considered in determining the sufficiency of such pleading, but must be disregarded. *Dudley v. Pigg*, 149 Ind. 363, 364, and cases cited; *Fitch v. Byall*, 149 Ind. 554, 557; *Gum-Elastic, etc., Co. v. Mexico, etc., Co.*, 140 Ind. 158, 160, 161, and cases cited; *Newman v. Ligonier, etc., Assn.*, 97 Ind. 295, 296, 297, and cases cited.

Copies of the note and mortgage sued upon were filed with the complaint as exhibits. It is provided in said notes that certificate number 1474 for eleven shares of the capital stock in appellant corporation, held and owned by appellee Mary B. Plank, are transferred and pledged to appellant as collateral security for said note and mortgage. A copy of said

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certificate of stock is also filed with the complaint as an exhibit. It is alleged in the complaint that certificate number 1474 for eleven shares of stock of said association, held and owned by appellee Mary B. Plank, were transferred and pledged to appellant as collateral security to secure said note and mortgage. Said assignment was contained in the note. The complaint clearly identified the shares of stock against which it was sought to enforce the lien.

It is evident that this is not an action on the certificate of stock within the meaning of section 265 Burns 1894, section 362 Horner 1897, but an action on the note and mortgage and to enforce a lien against said shares of stock. The contract sought to be enforced as to the stock is the written assignment thereof as collateral security, which is contained in the note and mortgage. The shares of stock described in the written assignment are the security, just as the real estate described in the mortgage is the security provided by that instrument.

It follows that the court erred in sustaining the demurrer to the complaint. Judgment reversed, with instructions to overrule the demurrer to the complaint.

ZIMMERMAN ET AL. v. MAKEPEACE.

[No. 18,545. Filed February 21, 1899.]

COURTS.—*Execution.*—*Injunction.*—The court of one county may restrain the illegal sale of lands in such county under an execution issued from the court of another county. pp. 201, 202.

PARTIES.—*Trusts*—Where the trustee has resigned, and no successor has been appointed, the *cestui que trust* may bring suit to enjoin the illegal sale of the trust estate. p. 202.

INJUNCTION.—*Executions.*—Courts of equity have jurisdiction to enjoin an execution sale of real estate which might cloud and complicate the title thereof, although such sale would pass no right or title to the purchaser. p. 202.

EXECUTION.—*Trust Estate.*—Where lands were devised to trustees who were to keep the same rented and pay the rents and profits collected to the son of testatrix annually during his life, or if the

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son should fail to provide for his family, to apply a sufficient amount thereof to its support, and pay to the son the overplus, and at his death to convey the lands to certain persons, with power to sell and convey the land at any time and account for the interest and purchase money in the same manner as the land and its rents were to be accounted for, the son has no interest in the lands subject to sale on execution for his debts, under subdivision four of section 752 R. S. 1881. pp. 202, 203.

**APPEAL AND ERROR.—*Injunction.***—An appeal from a term-time interlocutory restraining order cannot be taken after the close of the term. p. 204.

**SAME.—*Injunction.*—*Waiver.***—An alleged error in refusing to dissolve a restraining order is waived by putting the cause at issue and proceeding to trial on the merits. p. 204.

From the Delaware Circuit Court. *Affirmed.*

*H. D. Thompson*, for appellants.

*F. A. Walker* and *F. P. Foster*, for appellee.

**BAKER, J.**—Suit for injunction to restrain Zimmerman, as judgment creditor, and Starr, as sheriff of Delaware county, from selling land on execution against Makepeace, issued from the Madison Circuit Court.

Complaint exhibits these facts in substance: Appellee's mother, Nancy Makepeace, devised the undivided half of her lands to Alvira J. Corwin and John E. Corwin in fee simple, in trust for the following uses: that the land be kept rented by the trustees and the annual rents and profits collected and, after paying taxes and other necessary expenses, paid to and for Allen Q. Makepeace, annually and as soon as received by the trustees, during his life; and immediately after his death, the trustees or their successor shall convey to his legitimate children, if any survive him, in equal proportions in fee simple the land held in trust; and if no lawful issue survive him, to Alvira J. Corwin in fee simple; or if the trustees shall find in their judgment it would be better to convert the land into personalty, they are empowered to do so at any kind of sale, at their discretion, and to convey it in fee simple free of encumbrance, and to put the proceeds at interest and account

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for the interest and purchase money in the same manner the land and its rents are specified to go; the annual payments directed to be made to and for Allen Q. Makepeace are intended to provide for his necessary support and that of his family, and should he be of dissolute and intemperate habits, or from other causes fail to provide for his family, the trustees shall apply to the support of his family a sufficient amount out of the sums to be paid him to provide for the necessary support of his family, and pay him only the overplus. The Corwins acted as trustees till June 11, 1891, when the Madison Circuit Court appointed Dusang as their successor. Dusang resigned his trusteeship on June 25, 1895, and a successor has not been appointed. While Dusang was trustee, the trust estate was set off in severalty. Zimmerman recovered a money judgment against Makepeace in the Madison Circuit Court and caused execution to issue to the sheriff of Delaware county. Under direction of Zimmerman the sheriff levied on land set off to the trustee in the partition proceedings, has advertised it for sale, and will proceed unless restrained.

The joint demurrer of appellants and the separate demurrer of Zimmerman, for want of facts, were overruled. Appellants joined in a general denial. Zimmerman answered separately in two paragraphs, the first purporting to be an affirmative answer, the second a general denial. Demurrer to first paragraph of Zimmerman's separate answer sustained. Temporary injunction pending trial was made permanent on final decree. Appellants' joint and Zimmerman's separate motions for new trial were overruled.

The first assignment challenges the jurisdiction of the Delaware Circuit Court. The argument is that the Delaware Circuit Court was asked to nullify the final process and thereby impugn the judgment of the Madison Circuit Court. If this be true, the decree is erroneous. *Plunkett v. Black*, 117 Ind. 14. But the judgment of the Madison court was not attacked; nor was its final process sought to be canceled.

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The only relief invoked was the granting of an injunction to restrain an illegal exercise of power under an unquestioned execution. In affording this remedy a court of equity necessarily has power to proceed against the holders of a writ of another court. Injunctions operate *in personam*. The Delaware Circuit Court as a court of equity had jurisdiction of the subject matter and was the proper court to restrain persons in Delaware county from beclouding titles in Delaware county.

The second assignment involves the sufficiency of the complaint.

The first point concerns appellee's right to sue. If there was a trustee, he should have been plaintiff. If a trustee neglects or refuses to act, the *cestui que trust* may protect the estate. Beach on Trusts and Trustees, section 698. In this case, the trustee had resigned and the court had not appointed a successor. Appellee as a *cestui que trust* was entitled to bring this suit.

The second point questions the right to enjoin an execution sale under which no title nor right would pass to the purchaser. The contention is that the landowner has a complete remedy at law. The jurisdiction of equity to enjoin a sale that would be fruitless to the judgment creditor and might cloud and complicate the title, is thoroughly established. Freeman on Ex., section 438; Herman on Ex., 614; Beach on Inj., section 710; High on Inj., section 372; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Bank v. Deitch*, 83 Ind. 133; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. R. 731; *Scobey v. Walker*, 114 Ind. 254.

The third point goes to the interest of appellee in the land. Appellee sued as representative of the trust. The case stands as if the trustee were plaintiff. Section 752 R. S. 1881, section 764 Burns 1894, section 752 Horner 1897, provides: "The following real estate shall be liable to all judgments and attachments and to be sold on execution against

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the debtor owning the same or for whose use the same is holden, viz: \* \* \* Fourth. Lands, or any estate or interest therein, holden by any one in trust for or to the use of another."

If Makepeace in his individual right has no estate nor interest in the land held in trust, it becomes unnecessary to determine what equitable estates or interests in land may be sold on execution, or to attempt to reconcile the decisions in *Terrell v. Prestel*, 68 Ind. 86, and *Maxwell v. Vaught*, 96 Ind. 136. Under the will of Nancy Makepeace, the trustees are empowered, at any time during the life of appellee, at their discretion, to sell the land and give the purchaser the full title the testatrix had. If they should do so, the proceeds of sale must be held by them to the same uses for which they held the land; if they should not, they must convey the full title to the children of appellee at his death. It is manifest that a deed by appellee of any estate or interest in the land could not prevent the trustees from conveying the full title. If the trustees conveyed, appellee's deed could give the grantee at most only an equitable claim upon the trustees to account to him for the use of the purchase money agreeably to the terms of the trust. If the trustees should not sell, appellee's deed would not give the grantee the right to dispossess the trustees or to interfere with their control of the land in any way; the grantee at most could only call on the trustees, after they had received the annual rents and profits, to pay him the uncertain amount, if any, that might be left after they had paid the taxes and necessary expenses and devoted what was necessary in their judgment for the support of appellee's family; that is, the deed could amount to nothing beyond an equitable assignment of an equitable chose in action. Appellee has no estate or interest in the trust lands. *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295, and note on pages 304-7; Freeman on Ex., sections 187-8.

Whether appellee has an estate or interest in the body of the trust that is alienable in anticipation of the yearly pay-

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ments, does not arise properly in this record. *Thompson v. Murphy*, 10 Ind. App. 464; Beach on Trusts and Trustees, section 567.

The third assignment is based on the refusal to dissolve the restraining order. This was a term-time interlocutory order. No appeal from it could be taken after the term. Sections 646-7 R. S. 1881, sections 658-9 Burns 1894, sections 646-7 Horner 1897. The alleged error was waived by appellants in putting the cause at issue and proceeding to trial on the merits. *Becknell v. Becknell*, 110 Ind. 42.

The fourth assignment presents the motion for a new trial. Three reasons are given. The first, that the Delaware Circuit Court had no jurisdiction, has been considered. The second is that the finding is not supported by sufficient evidence. Appellee's evidence amply covered every material point; appellants introduced none. The last ground is that the finding is contrary to law. Under the evidence, the law could permit no other finding.

Zimmerman assigns separately that it was erroneous to sustain a demurrer to the first paragraph of his separate answer. This paragraph stated substantially the same facts set forth in the complaint, and thereupon affirmed that Makepeace owned the land in fee simple and that the sale ought to proceed. Clearly bad.

Decree affirmed.

### SCHNECK v. THE CITY OF JEFFERSONVILLE ET AL.

[No. 18,367. Filed Dec. 20, 1898. Rehearing denied Feb. 21, 1899.]

**MUNICIPAL CORPORATION.**—*Costs Incident to Location of County Seat May be Imposed Upon City Where Located.*—A city receives such special benefits from the location of a county seat within its corporate limits as would justify the legislature, in its discretion, in authorizing the entire burden of the expenses incident to such location to be laid upon the property of such city. *pp. 211, 212.*

**SAME.**—*Municipality Serves as an Agency for the Legislature.*—A municipal corporation serves but as an agency or instrumentality in

152	204
155	149
155	197
155	206
152	204
159	581
155	204
161	828
163	48
152	204
167	633



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the hands of the legislature to carry out its will in regard to local governmental functions. p. 212.

**MUNICIPAL CORPORATION.—Aid for Public Improvements.—Location of County Seat.—Statute Construed.**—The location in a city of a county seat and the erection of the necessary county buildings are not "public improvements or public works" within the meaning of section 3152 R. S. 1881, authorizing cities to donate money or bonds in aid of public improvements or public works. pp. 212, 213.

**SAME.—Bonds for the Relocation of County Seat.—Statutes Afford Color of Legal Authority.**—Section 2 of the act of March 9, 1875, (Acts 1875, p. 34), authorizing county authorities to accept donations towards the expenses of constructing public buildings in connection with the relocation of a county seat, construed with section 3152 R. S. 1881, empowering cities to donate money or bonds in aid of public improvements or public works, did not, in the year 1876, authorize a city to incur a debt for the removal of a county seat and issue bonds therefor; but these sections of the statutes afforded such color of legal authority for the issue of bonds for that purpose that it will be presumed that when such bonds were issued that the common council of the city acted in good faith. pp. 212-215.

**CONSTITUTIONAL LAW.—Legalizing Act.—Municipal Bonds.**—In the absence of constitutional restrictions the legislature has the right to legalize the bonds of a city so long as vested rights have not intervened. pp. 216, 217.

**SAME.—Act Legalizing Jeffersonville City Bonds.**—The act of March 2, 1897, legalizing certain bonds of the city of Jeffersonville did not create a debt of the city greater than two per cent. of the valuation of the property therein, in violation of section 1, article 18, of the Constitution as amended March 14, 1881, but simply legalized the debt which the legislature recognized as having existed before the Constitution was thus amended. pp. 221, 222.

**SAME.—Legalizing Act.—Exercise of Judicial Power by Legislature.**—Where certain bonds have been judicially declared to be invalid, an act legalizing such bonds is not an attempt of the legislature to exercise judicial power in violation of section 1, article 7 of the Constitution, as respects an action involving the validity of such bonds commenced after the passage of the legalizing act. p. 225.

**SAME.—Act Legalizing City Bonds Not Local and Special Legislation.**—An act legalizing city bonds is not unconstitutional as being local and special legislation, since such legislation does not fall within the cases enumerated by section 22, article 4, of the Constitution. p. 226.

From the Clark Circuit Court. *Affirmed.*

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*O. H. Montgomery, Merrill Moores, J. K. Marsh and C. P. Ferguson & Son*, for appellant.

*George H. Voigt, M. Z. Stannard and W. A. Ketcham*, for appellees.

JORDAN, J.—Appellant is a resident of this State, and the owner, as alleged, of valuable real property situated in the city of Jeffersonville, Clark county, Indiana, and a taxpayer of said city. On March 30, 1897, in his own behalf, and, as averred in the complaint, in the behalf of other numerous taxpayers of that city, he instituted this action to obtain an injunction enjoining the city and the members of its common council, and others of its officials, from issuing and selling certain bonds of the city in order to refund an indebtedness of the city of Jeffersonville, evidenced by outstanding bonds previously issued and negotiated by the proper authorities.

Each of the defendants separately demurred to the complaint on the ground that the facts therein alleged were not sufficient to constitute a cause of action. These demurrers were sustained, and the lower court thereby denied the right of appellant, under the facts, to the relief demanded, and this decision is challenged by appellant, under his assignment of errors, and presents the questions involved by the facts set forth in the complaint. The latter discloses the following facts: The city of Jeffersonville is duly incorporated as a city under the general laws of this State relating to the incorporation of cities; and prior to August, 1876, it incurred an indebtedness amounting to \$87,000, which was created by the city, and in part arose out of the expenses and costs incident to the removal of the county seat of Clark county from Charlestown, and locating the same in the said city of Jeffersonville, and in part was incurred and created by the city in the purchase of real estate within its limits for a court-house and jail, and the construction thereon of these public build-

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ings, rendered necessary by the change or removal of the seat of justice to its new site.

On August 8, 1876, this indebtedness existed in the character of notes, accounts, and city warrants, no part thereof at that time having been funded. On the date last mentioned the common council adopted an ordinance whereby the funding of said indebtedness of \$87,000 was authorized, and negotiable bonds of the city to that amount were directed, under the ordinance, to be issued and negotiated for the purpose of raising money to pay off said indebtedness as it then existed. Accordingly, on August 9, 1876, in pursuance of said ordinance, the city, through its proper officials, issued its negotiable bonds, maturing in twenty years from said date, bearing interest at seven and three-tenths per cent. per annum, and sold them to raise funds for the purpose directed by said ordinance.

On April 21, 1896, in order to refund, at a lower rate of interest, these bonds, which were then still outstanding and about to mature, the common council, under the provisions of the act of the legislature approved March 2, 1895, (Acts 1895, p. 87) passed an ordinance which is set out in full in the complaint. This latter ordinance recites the facts in regard to the issuing and sale by the city in August, 1876, of the bonds in question, and further states that these bonds were issued and sold for the purpose of raising money to pay off certain obligations of the city, which indebtedness it had incurred for public improvements in said city prior to the amendment of the State's Constitution on March 14, 1881, which prohibits any political or municipal incorporation in this State from becoming indebted in any manner or for any purpose to an amount in the aggregate exceeding two per cent. of the value of the taxable property within such corporation. It is further recited in this ordinance that these bonds were a just and legal indebtedness of the city and that their validity had never been called in question. The ordinance also states that the rate of interest which the bonds bear is excessive, and,

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as they will become due and payable on August 9, 1896, it is provided and ordained therein that, in order to refund the bonds at a lower rate of interest, and extend the time of payment, the proper city authorities are authorized to issue other bonds to a like amount of those outstanding, to bear date of August 9, 1896, drawing five per cent. interest, etc.

The complaint proceeds to aver that the city, in pursuance of this last mentioned ordinance, unless enjoined, will issue and sell these refunding bonds, as provided by the ordinance, in order to raise money to pay off and redeem the bonds issued in 1876, and it is further alleged that on April 21, 1896, the city of Jeffersonville was, and continuously since that date has been, indebted in excess of two per cent. of the valuation of the taxable property therein. The further charge is made by the pleading that the city had no right or authority to issue the bonds which it is attempting now to refund, and that it has no right or power to refund the same as it is now proposing to do. It is charged in the complaint that the power or authority of the city to issue and negotiate the bonds in question, under the facts, as it originally did, and its right to refund them, as it is proposing to do, were denied by this court in the case of *Meyers v. City of Jeffersonville*, 145 Ind. 431.

The complaint then alleges that, after the decision in the latter case, the legislature enacted a statute, approved March 2, 1897, which is entitled: "An act to legalize certain bonds issued by the city of Jeffersonville, and to permit said bonds to be refunded, and declaring an emergency." This statute, which professes to legalize and validate in all respects the bonds in controversy, is set out in the complaint, and the latter then proceeds to assail the validity of this law: (1) That the legislature did not possess the power, under the circumstances, to legalize the bonds in dispute, and to authorize the refunding thereof; (2) that the act, by legalizing the bonds, creates a new debt and thereby renders the city's indebtedness in excess of two per cent. of its taxable prop-

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erty, in violation of the said amendment to the Constitution of March 14, 1881; (3) that this statute is special and local and for this reason is violative of the Constitution. The complaint closes with a prayer that the city and its officers be perpetually enjoined from refunding the bonds, etc. After the cause had been appealed to this court, Michael Ronan, a holder of one of the bonds, applied for and was granted leave by this court to intervene as a party appellee *pro interesse suo*, and through his counsel he has filed a brief in support of the decision of the lower court.

The questions presented and so ably argued, *pro* and *con*, by counsel for the respective parties, may be said to be embraced within two propositions. (1) The validity of the bonds, under the authority, if any, which the city had to issue the same for the purpose which it did; (2) the validity of the curative statute of 1897, and its effect upon the bonds in controversy as an indebtedness of the city of Jeffersonville.

In the case of *Meyers v. City of Jeffersonville*, 145 Ind. 431, being the same case mentioned in the complaint—the validity of the bonds now in dispute, and the right of the city to refund them, were involved. Their validity, under the facts then existing, and the right of the city to refund them, was, by the unanimous decision of this court in that case, denied, and the judgment of the lower court, sustaining the legality of the bonds, and denying the prayer of the complaint for a writ of injunction to prevent the city from refunding them, was reversed. None of the holders of the bonds were made parties to that action, and it seemingly was a friendly suit, instituted and prosecuted in order that the opinion of this court might be obtained relative to the legal *status* at that time of the bonds in controversy.

At the next session of the legislature following that decision, the statute legalizing the validity of these bonds was passed. See Acts, 1897, p. 108. This court, in *Meyers v. City of Jeffersonville*, 145 Ind. 431, in the course of its

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opinion, speaking in reference to the validity of these bonds, said: "Counsel for the appellees cite us to no express authority from the legislature, for the issue of bonds for the purpose of defraying the expense of litigation incident to the removal of a county seat, and the cost of a lot and a court-house and jail for a county, made necessary by such removal. Nor have we been able to find any such express authority."

It is insisted by the learned counsel for Ronan, the intervenor, that it was within the province of the legislature in 1876, and prior thereto, under the Constitution of this State, by appropriate legislation, to have authorized the city of Jeffersonville, through its common council, to render financial aid or incur the indebtedness which it did, under the circumstances, in the removal of the county seat from Charlestown, and its location in the said city of Jeffersonville. Or, in other words, that the legislature might have authorized the common council of the latter city, previous to August 8, 1876, to exercise the power which it assumed to exercise under the ordinance of that date in issuing the bonds for the purpose in question. In support of this insistence, we are referred to the holding of this court in the appeal of the *Board, etc., v. State, ex rel.*, 147 Ind. 476, and the authorities there cited. In that case, which pertained to the removal of the county seat of Jackson county, we said: "The special benefits and conveniences which will result to those residing within the immediate locality in which a county seat is located and maintained by reason of the enhancement of the value of their property, are facts which are well recognized by all and generally serve to stimulate the inhabitants of such localities in their earnest efforts to secure the location of the county seat in their own vicinity, and no doubt it was the knowledge of this fact which prompted the legislature in requiring the inhabitants of the particular township to bear the burden of this special tax for the purpose designated. This court in *Marks v. Purdue University*, 37 Ind. 155, recognized the doctrine that the lawmaking power may impose

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the expense of a public improvement upon a particular locality which will receive benefits derived therefrom. \* \* \* On no view of the question can it be asserted that the statute conflicts with the fundamental law for the reason that it creates a special district out of the township wherein the new county seat is to be located, and confines the assessment of the tax to construct the new buildings to this particular locality. Cooley on Taxation, p. 149. The legislature in its wisdom having authorized the entire tax for the construction of these new buildings to be assessed against the taxable property of those whom in reason it considered would be immediately benefited by the relocation of the county seat, we are aware of no provisions of our Constitution, under the circumstances, which would deny it the power to place the whole burden where it deemed it proper to rest."

We concur with counsel in their contention; and, in view of the principles asserted in the case from which we have quoted, and those affirmed in the well considered cases therein cited, especially in that of *Marks v. Purdue University*, 37 Ind. 155, their claim or contention in this respect is amply supported by the authorities. It would certainly seem that the same principle which permits municipal corporations, by legislative authority, to make donations or incur indebtedness in aid of the location within their limits of railroads and other public improvements of a like nature and benefit to the public is applicable, and serves to sustain the doctrine for which counsel contended. The power of taxation must be exercised for a public purpose, and unless restricted, however, by some provision of fundamental law, it may be exercised or conferred by the legislature to an unlimited extent. It is certainly a fact, and one well recognized, that the location of a county capital or seat of justice at a particular town or city, and the erection therein of the necessary county buildings, and the administration thereof of all the affairs or public business of the county, are matters of public concern, and much to be desired by the inhabitants of

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such town or city, immediately and especially benefited thereby in many respects. The location of a county seat therein, in view of all the incidental benefits and advantages derived therefrom by the citizens of the place in general, may certainly be considered of such benefit to and enhancement of all the property therein, as, under the circumstances, would justify the legislature, in its discretion, in authorizing the entire burden of the expense incident to such location to be laid upon the property of the particular district composed of the territory within the limits of such municipal corporation, by providing for the discharge or payment thereof by taxes levied upon all the property in such district subject to taxation. That this right or power is vested in the State, to be exercised or conferred by it through its legislature in the light of the principles advanced or asserted in *Board, etc., v. State, ex rel.*, 147 Ind. 476, and the authorities therein cited, cannot be successfully denied. A city, like other municipal corporations, serves but as an agency or instrumentality in the hands of the legislature to carry out its will in regard to local governmental functions and internal concerns. *Dillon Munic. Corp.*, sections 20 and 21; *Beach Pub. Corp.*, sections 5 and 478; 15 Am. and Eng. Ency. of Law, pp. 952 and 953; *Center School Township v. State, ex rel.*, 150 Ind. 168. Subject to the restrictions of the State and Federal Constitutions, the legislature would seem to have complete power and control over municipal corporations. Especially is this true in reference to authorizing them to contract debts, and to issue and sell negotiable bonds, and other evidences of such indebtedness. *Simonton on Munic. Bonds*, section 284.

Counsel for appellee assert that, in view of the fact that this is the first opportunity that a holder of any of these bonds has had to be heard in regard to their validity, and in consideration of the contention of appellant's counsel, whereby they assail the bonds as incurably invalid and ask this court to adjudge, in effect, that the holders thereof are



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without remedy in the premises, and that the citizens of Jeffersonville are entitled to enjoy the benefits which they have received as a result of the expenditure of the money for which these bonds were issued and sold, and at the same time be permitted to repudiate what, under the circumstances, they ought to consider as just and binding obligations, therefore, in view of all this, they feel justified in citing us to a statute which they insist is not shown to have been considered in *Meyers v. City of Jeffersonville*, 145 Ind. 431. The provisions of this law, they contend, will sustain the acts of the city in incurring the indebtedness in aid of the construction of the public buildings rendered necessary by the removal and location of the county seat. It is then claimed, that, by an act approved March 9, 1875, (Acts of 1875, p. 34, R. S. 1876, p. 378) which relates to public grounds and public buildings on the relocation of county seats, under the provisions of section two, the county authorities of Clark county were given the right to accept donations towards the expenses of constructing public buildings in connection with the relocation of the county seat. Section two provides as follows: "Whenever \* \* \* there shall be paid or donated towards the erection of a court-house and the necessary offices at the new county seat, etc." The further claim is then advanced by counsel that by the provisions of section sixty of the general system of laws relating to the incorporation of cities (See Davis 1876, p. 298, section 3152 R. S. 1881) which it is insisted must be construed along with the provisions of section two of the act of March 9, 1875, *supra*; and, when so construed, it is contended that this latter section must be held sufficient to have empowered the city of Jeffersonville to make donations in money or bonds to aid in the construction of the court-house and other public buildings of the county at said city, which, as insisted, ought to be held public improvements, within the meaning of section sixty, *supra*. The greater part of the provisions of this section of the statute deals with the power conferred by the legisla-

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ture upon an incorporated city on the petition of a majority of its resident freeholders to subscribe to the stock of railroads and other roads, or to make donations in money or bonds, to aid in the construction of such works. It also permits donations by a city in money or bonds in aid of "public improvements or public works."

Without elaborating upon the question thus presented by counsel, in regard to the construction or interpretation of the statute mentioned, we are of the opinion that their contention is not tenable, and cannot be sustained. When the scope of this statute is considered, the clause "public improvements or public works" cannot be so extended or construed as to authorize the city to render aid, by donation in money or bonds, in locating therein the seat of justice and constructing the necessary county buildings; and we are compelled to adhere to the exposition of the law given in *Meyers v. City of Jeffersonville*, 145 Ind. 431, that the city was not invested at the time with legislative authority to incur the indebtedness and issue the bonds in question. But it may at least be said, we think, that the provisions of this section afford a semblance or color of legal authority for the action of the city in issuing its bonds for the purpose as it did. In view of this feature of the case, nothing being disclosed to the contrary, it will not be unreasonable to presume that the common council of the city of Jeffersonville relied on this statute, and upon the petition of a majority of the resident freeholders thereof exercised thereunder the power which it did.

It is more reasonable to indulge in this presumption, under the circumstances, than in one that would place the city authorities in the attitude of exercising authority without any color or semblance of law whatever. Granting the power of the legislature, under our Constitution, as we must, for no sufficient reason is shown for denying it, to have originally authorized the common council of the city of Jeffersonville to issue and negotiate bonds to obtain money for the payment of the indebtedness incurred by the city as a donation, to effect-

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uate the purpose or object heretofore mentioned, we may next proceed to inquire in regard to the power of the legislature, under the circumstances, subsequently to ratify, confirm, and legalize that which it originally might have empowered the city to do, and whether such legislation may, in effect, be considered the equivalent of legislative authority in the first instance, and to operate with like effect.

There can be no doubt in regard to the intent or meaning of the ratifying act of 1897. The legislature, in the first section, distinctly declares that certain bonds or instruments to the amount of \$87,000, issued under an ordinance of the common council of the city of Jeffersonville on the 8th day of August, 1876, due and payable twenty years after date, "are hereby ratified, confirmed, and declared to be legal and valid obligations of such city, and the said ordinance of the common council and all acts done in respect to the issue of such bonds are hereby ratified, confirmed, and made legal." Section two provides that the common council of said city may refund said bonds by issuing in exchange therefor other bonds of equal amount, and may fix the time and place of payment, and the rate of interest. It is then declared that, when refunding bonds have been issued, no action or proceedings shall be instituted by the city, or any other person or persons, the object of which shall be to impair the validity or security of such refunding bonds, nor shall any defense be interposed to any action by the city, or other persons, the object of which defense shall be for a like purpose. Section three dispenses with notice in the event refunding bonds are issued, unless required by the common council. Section four declares an emergency for the immediate taking effect of the act. It is conceded by counsel for appellant that there is no constitutional restriction in this State against a passage by the legislature of what is denominated a curative or legalizing statute; but it is insisted, however, that, as there was an entire lack of legislative authority upon the part of the city of Jeffersonville to incur the debt and issue the bonds, as it

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did, that therefore the statute in controversy cannot, in effect, operate to supply the original authority which was lacking, but can only operate to cure irregularities, and dispense with certain formalities, etc. Appellant's counsel further contend that the act in question virtually creates the indebtedness in dispute, and, as the facts in the case disclose that the city of Jeffersonville on and after April 21, 1896, was indebted in excess of two per cent. of the value of its taxable property, therefore the statute is violative of article 13, section 1, as amended March 14, 1881.

The purpose or object of the act plainly was to legalize and validate the acts of the city,—the latter, as heretofore stated, being but an agency or instrumentality in the hands of the legislature,—by ratifying and confirming the authority assumed, which, as we have seen, might have been originally conferred, and the exercise thereof lodged in the city's common council, it being a matter over which the latter would have had jurisdiction in the event such authority had been originally conferred upon the city. The object or intent of the legislature in the enactment of the statute was to fully validate the bonds in all respects, and to make them binding obligations, so far as the legislature could, whether their invalidity consisted in the absence of authority to issue them for the purpose mentioned, or existed on account of any irregularities or informalities by which they might be affected. This purpose or object, we are constrained to hold, was accomplished by the act in controversy, and that the law-making power thereby ratified, confirmed, and made legal the unauthorized power or authority which the city, through its council, assumed to exercise. In its effect and operation the act must be held equivalent to conferring original legislative authority upon the city of Jeffersonville which would have authorized it to incur the indebtedness and issue the bonds to obtain the necessary means to defray the debt; and these obligations must therefore be considered in the same light as though they were valid *ab initio*, unless the curative

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statute can be said to be open to the objections urged against it by appellant. That the legislature has the power to enact legislation of the character of that in question, in the absence of constitutional restrictions either federal or state, where vested rights have not intervened, is well affirmed and settled by many decisions, not only in this jurisdiction but elsewhere. Among the number we cite the following: *Walpole v. Elliott*, 18 Ind. 258; *Sithin v. Board, etc.*, 66 Ind. 109; *Marks v. Purdue University*, 37 Ind. 155; *Gardner v. Haney*, 86 Ind. 17; *Cookerly v. Duncan*, 87 Ind. 332; *Muncie Nat. Bank v. Miller*, 91 Ind. 441; *Kelley, Treas., v. State, ex rel.*, 92 Ind. 236; *Johnson v. Board, etc.*, 107 Ind. 15; *Bronson v. Kinzie*, 1 Howard 310, 331; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Thomson v. Lee County*, 3 Wall. 327; *City v. Lamson*, 9 Wall. 477; *New Orleans v. Clark*, 95 U. S. 644; *Mattingly v. District of Columbia*, 97 U. S. 687; *Pompton v. Cooper Union*, 101 U. S. 196; *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. 208; *Quincy v. Cooke*, 107 U. S. 549, 2 Sup. Ct. 614; *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736; *City of Bridgeport v. Housatonuc R. Co.*, 15 Conn. 475; *Lycoming v. Union*, 15 Pa. St. 166; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *State, ex rel., v. Mayor, etc.*, 10 Rich. (S. C.) 491; Simonton on Mun. Bonds, sections 256 and 257; Cooley on Const. Lim. 466; Beach Pub Corp., section 904.

The Supreme Court of the United States, it will be seen upon the examination of its decisions, has repeatedly affirmed and adhered to the doctrine that, where municipal corporations have issued bonds or other evidences of indebtedness which, at the time of their issue, were unauthorized, it is within the power of the legislature to validate and legalize such issue by subsequent curative legislation. Such ratifying or legalizing act of the legislature, as the authorities

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assert, is of the nature, or, rather, analogous to, a ratification by the principal of the unauthorized acts of the person who assumed to be his agent. The act of the latter had no validity of itself, but the ratifying act of the principal is of the same and equal import in all respects as original authority. *Marks v. Purdue University*, 37 Ind. 155; *Sithin v. Board, etc.*, 66 Ind. 109; *Beloit v. Morgan*, 7 Wall. 619; *Grenada County, etc., v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Mattingly v. District of Columbia*, 97 U. S. 687; *Pompton v. Cooper Union*, 101 U. S. 196; *Persons v. McKibben*, 5 Ind. 261; *Express Co. v. Rawson*, 106 Ind. 215; *Bolton Partners v. Lambert*, 41 Ch. Div. 295.

In *Marks v. Purdue University*, *supra*, the board of commissioners of Tippecanoe county made an order donating \$50,000 for the purpose of securing the location of an agricultural college in that county. This action of the board of commissioners was subsequently ratified by the legislature, and the question in regard to the invalidity of the order of the board on account of lack of legislative authority, and also in respect to the effect of the curative legislation, was presented to the consideration of this court in that appeal. In the course of the opinion in that case, Worden, J., speaking as the organ of this court, said: "We come to the question as to the power of the board to make the order. No statute has been cited, and we are not aware of the existence of any, in force at the time, that authorized the making of the order. It follows that the order was made without legislative authority. Still it was not void in that absolute sense that made it incapable of ratification. If a party, without authority, but professing to act as the agent of another, does an act in the name of his supposed principal, the act is not absolutely void, but may be ratified by the supposed principal, and when so ratified it is as valid as if the pretended agent had had full authority when the act was done. That an order of the board of commissioners, made without authority of law, may be ratified and rendered valid and effectual, is established by

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the numerous cases in this court upholding the act of March 3, 1865, Davis Supp. 1870, p. 565, legalizing bonds, orders, and appropriations made for the purpose of procuring or furnishing volunteers and drafted men, etc.”

In *Johnson v. Board, etc.*, 107 Ind. 15, this court said: “There is no inhibition in the Constitution against the passage of retrospective statutes. That such statutes may be passed by the legislature, in the absence of a constitutional inhibition, is well settled. And especially is this so, if the effect of the statute is in accord with justice, equity, and sound public policy. And hence such statutes have been sustained, where their effect was to render valid contracts, which, but for them, would have been void. \* \* \* It is settled by our decisions, and the authorities elsewhere, that curative or retrospective statutes may cure defects and irregularities in proceedings, even though the defects and irregularities are so flagrant as to render the proceedings, for all practical and enforceable purposes, null and void.” Again on page twenty-three of the opinion in this case it is said: “Applying the above rulings, and the rule upon which they rest, to the case before us, it may well be said that as the legislature might, in the first instance, have provided by general law for the location and opening of free gravel roads by the county boards at any session, so it can, by subsequent curative or retrospective general law legalize and validate all such proceedings taken and had at any session of such boards. The curative act of 1885, therefore, is not objectionable on the ground that it is retrospective.”

In the case of *Mattingly v. District of Columbia*, 97 U. S. 687, Justice Strong, speaking as the organ of the Supreme Court of the United States, in the opinion on page 689, said: “Were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainants’ property, or to assess in the manner in which the assessment was made,

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the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been congressional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the district, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority."

In *Pompton v. Cooper Union*, 101 U. S., on page 202, the same court again said: "In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. \* \* \* Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company,—a legislative construction entitled to great respect."

In *Beloit v. Morgan*, 7 Wall., on page 624 of the opinion, it is said: "Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution. The same principle has been applied in the courts of the states. This court has repeatedly recognized the validity of private and curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected."



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The ratifying act of 1897 cannot be said to fasten unwillingly upon the city the indebtedness, and thereby compel its payment. In a sense it simply gives effect to the will of the city, as expressed by it in 1876, through its common council, and no doubt also ratifies the desire of a large majority of the resident freeholders, expressed, presumably, to the common council, by means of petition or otherwise. The council, as we have seen, in the refunding ordinance of April 21, 1896, declared the bonds to be just obligations of the city, and that their validity had never been called in question. These bonds had existed unchallenged for a period of nearly twenty years after their execution, and after the city had derived the benefits of their proceeds, and not until the institution of the suit in the Meyers case, so far as we are apprised, was their validity assailed.

The contention of appellant's counsel that the legislature was not empowered to enact the statute in dispute, for the reason that it creates a debt, and thereby the city, at the time of its passage, became indebted in excess of the constitutional limit fixed by section 1, article 13, as amended March 14, 1881, is not tenable. The legislature, by the act in question, neither created nor professed to create a debt. It simply recognized the indebtedness and bonds as having an existence in 1876, and ratified, confirmed, and legalized them.

The appellant recognizes in his complaint that the statute did not create the debt, for therein he avers that the indebtedness for which the bonds were issued was incurred by the city prior to August 9, 1876. While it is true that the bonds which evidenced the indebtedness in dispute, strictly speaking, were not, at the time of their execution and sale in 1876, impressed with such validity as to make them binding and enforceable obligations of the city, still, they were not invalid to the extent of rendering them incapable of ratification by the principal, the lawmaking power of the State; and, in a sense at least, they did exist as an indebtedness of the city from the time of their issue and sale, subject, however, to the required

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ratification by the legislature, and this act of the latter must be deemed to make them, from the beginning, a valid and subsisting indebtedness. This indebtedness was not incurred, nor the bonds issued, in defiance of law. They were simply impressed with the lack of authority of the issuing party, which, as we have seen, might have been previously conferred. As heretofore said, a curative act, under such circumstances, is analogous to the ratification by the principal of the assumed authority of his agent, which ratification relates back and binds the principal in like manner and to a like extent as though the authority assumed had been given in advance. In the case of contracts by the agent, under an authority assumed by him, no new or additional consideration is required to support the ratification by the principal, for by adopting the contract, he accepts it as duly authorized by him from the beginning with the original consideration. 1 Am. and Eng. Ency. of Law (2nd ed.) p. 1181; *Express Co. v. Rawson*, 106 Ind. 215.

Such ratification or confirmation by relation back affects the original unauthorized contract or transaction so that, as between the parties, their rights and interests are considered in legal contemplation as arising at the time of the original act or contract, and not merely from the time of ratification. A suit to enforce the obligation assumed by the ratifier is founded upon the original transaction or contract and not upon the act of ratification. *Grant v. Beard*, 50 N. H. 129; *Drakely v. Gregg*, 8 Wall. 242.

In reason, and in the light of the authorities to which we have referred, the bonds, ratified, legalized, and made valid by the curative act of the legislature, must be considered, in legal contemplation, to all intents and purposes, as though they had been valid and subsisting obligations of an indebtedness against the city at the date of their issue in August, 1876. At that time there existed no constitutional provision limiting the indebtedness of cities, and, to reaffirm what we have heretofore said, there was nothing in our fundamental

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law which would have prohibited the city of Jeffersonville, under legislative authority, from incurring the bonded indebtedness for the particular purpose as it did. It is settled that the constitutional amendment of March 14, 1881, is prospective and not retrospective, and it does not, in terms, forbid the legislature from legalizing previous acts of political or municipal corporations. Neither does it operate so as to affect the bonds of such corporations, issued prior to its taking effect, nor to prohibit the refunding thereof, and the act in question, under the facts, cannot be said to be in conflict therewith. *Powell v. City of Madison*, 107 Ind. 106; *Meyers v. City of Jeffersonville*, 145 Ind. 431; *Cooley on Const. Lim.* 77.

In the appeal of *Powell v. City of Madison*, *supra*, this court, speaking in regard to the operation of this amendment of our Constitution said: "Its operation was only prospective. Where the limit of a two per centum indebtedness had already been reached, it prohibited the contracting of any new or further indebtedness; and where that limit had not been reached, it simply restrained municipal corporations from incurring new debts in excess of such limit. Consequently, the only effect which the adoption of the constitutional amendment now before us had upon the sections of the statute under consideration, was to limit their application to the indebtedness of a city or town which had been contracted prior to the 14th day of March, 1881, and to such as has been since incurred, not in excess of the two per centum limit upon the value of its taxable property. As the ordinance, set out in the complaint, proposes to fund only indebtedness which had been contracted prior to said 14th day of March, 1881, it applies to a class of debts not affected by the constitutional amendment in question, and is, in consequence, not in conflict with any of the provisions of that article of the Constitution."

We have examined and given due consideration to the cases cited by counsel for appellant to uphold their conten-

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tion in respect to the invalidity of the legalizing act in controversy. It would unnecessarily extend this opinion were we to elaborate in the consideration of these authorities. It is sufficient to say that, in the main, under the circumstances, they are not applicable to the question involved in the case at bar. The case of *Sykes v. Mayor, etc.*, 55 Miss. 115, at first blush, would seem to lend some support to appellant's insistence, but, under the facts in this appeal and the law applicable thereto, it in reality cannot be said to sustain the questions which counsel for appellant advance. The facts in the case, briefly stated, are: In November, 1869, the mayor and aldermen of the town of Columbus caused to be issued to the Memphis, etc., R. Co., a large number of the town's bonds with coupons of interest attached. The plaintiff in error in that case brought an action of debt on certain ones of said coupons which were overdue, and of which he was a *bona fide* holder for value. A demurrer was sustained to the plaintiff's declaration on the ground that the town of Columbus had no power to issue, or cause to be issued, the said bonds and coupons. In December, 1869, a new Constitution was adopted by the state of Mississippi which, among other things, forbids any city or town to become a stockholder in or lend its credit to any corporation, etc., except on the condition that at an election two-thirds of the electors of the city assented thereto. After the adoption of this Constitution, the legislature, in 1872, passed a statute which declared that all subscriptions to the capital stock of said company, made by any county, city, or town, not made in violation of the Constitution of the State, "are hereby legalized, ratified, and confirmed." It was conceded that these bonds, before the passage of the curative act, were invalid, by reason of lack of legislative authority in the town to issue the same. The holding in the Sykes case was to the effect that after the issue of the bonds, and before the curative act of 1872 had been passed, the new Constitution had intervened and placed the legislature under a disability which prevented it from rati-

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fying the act, and thereby dispensing with the condition requiring that two-thirds of the electors must give their assent. In the case at bar, however, we have seen that, at the time the bonds were issued, there existed no constitutional inhibition, conditional, or otherwise, against the right of the legislature to confer upon the city the authority which it assumed to exercise. Neither has any fundamental restriction intervened since the issue of the bonds which can be construed to prevent the legislature from ratifying and legalizing the acts of the city leading up to and including their issue and sale, for when they are viewed as an indebtedness, existing since 1876, as they must be, for the reasons heretofore stated, the constitutional amendment of 1881 is not applicable.

In addition to the objections which we have already passed upon, it is said that the statute of 1897 is also invalid for other reasons: (1) That it, in effect, permits the property of the taxpayers of the city of Jeffersonville to be taken without just compensation, and is therefore violative of article 1, section 21, of the Constitution; (2) it denies to the taxpayers of the city privileges and immunities enjoyed by all other taxpayers of the State, and hence is in conflict with article 1, section 3 of the bill of rights, recognized by the Constitution; (3) that it is a legislative attempt to reverse or interfere with the judgment of this court in *Meyers v. City of Jeffersonville*, 145 Ind. 431, and for this reason is antagonistic to article 7, section 1 of the Constitution.

It is so evident that the first and second contentions are so devoid of merit that the mere statement thereof will fully expose that fact, and they may be dismissed without further consideration. In respect to the third objection, it may be said that at and before the time appellant commenced this action, the invalidity of the bonds in question had been fully cured by the act of 1897, then in full force and effect, and his rights in the premises must be determined under the law

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as it then and now exists, and not by the law as it stood prior to the time he instituted this suit. *Price v. Huey*, 22 Ind. 18; *King, Treas., v. Course*, 25 Ind. 202; *Johnson v. Board, etc.*, 107 Ind. 15. It is also suggested, or mildly insisted, that the statute is prohibited by the Constitution because it is local and special, instead of being general and of uniform operation. It certainly does not fall within any of the cases enumerated in section 22 of article 4 of the Constitution, and therefore it was within the discretion of the legislature to determine whether a general law was applicable. *Mode v. Beasley*, 143 Ind. 306; *Board, etc., v. State, ex rel.*, 147 Ind. 476; *City of Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337.

If the question of vested rights is in any way involved by reason of this statute, it is not presented in this appeal, and if it arises in favor of any party, it may be considered, when duly presented to this court. In our judgment, the validity of the bonds, and the right of the city to refund them, for the reasons stated in this opinion, must be sustained; and appellant's right to the injunction which he seeks was properly denied, and the judgment of the lower court is therefore affirmed.

## DISSENTING OPINION.

HACKNEY, J.—Conceding that ordinarily the ratification of an unauthorized act has the effect to confer authority for the act at the time it was done, I am not satisfied that the rule, as strongly as I have stated it, can be applied in this case. The bonds in question, at the time of their execution, and continuously up to the time of the passage of the act of 1897 were void. They were as no obligations. As sometimes said, they were as so much blank paper. The act of 1897 gives them the first life or validity possessed by them. Its practical effect is to create, for the city, a debt in the amount of the bonds. I do not dwell upon the question of legislative power to create a debt for a city; but where the debt is given life and vigor at a time when, under the Constitution, a debt

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could not be created by the city, even with express legislative authority, I do not feel satisfied that they could be rendered a debt valid by relation back to the time of their execution. Before the act the city did not owe the amount of the bonds. The bonds did not represent a debt. To make them a debt is an act exceeding the limits prescribed by the Constitution. I firmly believe that if the debt could not have been validly created in 1897, by authority of the General Assembly, there could exist no power to ratify or create a debt by relation back to a time when power did exist. This question relates to the power of the General Assembly, as it is limited by the Constitution. Under that instrument there is no power to create the debt, and, as I believe, no power to ratify it and give it relation back to a time when power did exist. In other words, the power to ratify exists only where the power exists to authorize the act sought to be ratified.

**MESSINGER v. THE STATE OF INDIANA.**

[No. 18,730. Filed Dec. 18, 1898. Rehearing denied Feb. 21, 1899.]

**CRIMINAL LAW.—Misconduct of Bailiff.—Presumption.—Jury.**—It will not be presumed in the absence of evidence that an improper statement made to a juror by the bailiff was communicated by him to other members of the jury, and that it exerted such an influence over the jury as to cause them to return a verdict against defendant in a criminal cause more unfavorable to him than they otherwise would. *pp. 228-230.*

**APPEAL AND ERROR.—New Trial.—Misconduct of Bailiff.—Evidence.—Weight.**—Where evidence presented by affidavit in a motion for a new trial in a criminal cause on account of the misconduct of the bailiff in charge of the jury is conflicting, the weight and force is a matter for the determination of the trial court. *p. 230.*

**NEW TRIAL.—Misconduct of Bailiff.—Jury.—Waiver.—Criminal Law.**—Where the accused fails to interpose objections in regard to the alleged misconduct of a bailiff in charge of the jury while in consideration of their verdict in the trial of a criminal cause before the return of the verdict against him, without showing a sufficient excuse for such failure, it will be presumed that he acquiesced therein, and he will not be heard after the return of the verdict to make complaint for the first time relative to such misconduct. *p. 231.*

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155	208
152	227
157	209
152	227
168	479

From the Starke Circuit Court. *Affirmed.*

*Burson & Burson*, for appellant.

*William L. Taylor*, Attorney-General, *Merrill Moores* and *F. J. Vurpillat*, for State.

JORDAN, J.—Appellant was charged by indictment with the crime of murder in the first degree, and, upon a trial by jury, was convicted of murder in the second degree, and, over his motion for a new trial, judgment on the verdict was rendered that he be imprisoned for life in the state prison. The only error assigned in this appeal relates to the decision of the trial court in denying his motion for a new trial. His counsel, in their brief, urge but two reasons for reversal, namely: (1) Misconduct of the bailiff in charge of the jury, which conduct, it is alleged, prevented appellant from having a fair trial; (2) that the verdict of the jury is not sustained by sufficient evidence.

We are requested by the learned counsel appearing for appellant to examine and consider the evidence in connection with the alleged misconduct of the jury bailiff, in order that we may be better enabled to determine the question involved in this feature of the case. We have carefully read and considered the evidence, and, while it may be said that it is conflicting to some extent, still it amply sustains the judgment. The misconduct imputed to the bailiff in charge of the jury arises out of the alleged fact that, after the jury had retired to deliberate on a verdict, and after their deliberation had continued for a number of hours, a member thereof came from the court room, which the jury was then occupying, to the door of the room leading from the court room to the sheriff's office, and inquired of the bailiff for the judge of the court, stating at the time that the jury were unable to agree and that they desired to see the judge. It is claimed that the bailiff, who at the time was in the sheriff's office, in response to this inquiry, informed this juror "that the judge had said



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that they would be a great deal older than they were before he would let them out, unless they agreed."

Appellant, in the lower court, endeavored to support the issue raised under his motion for a new trial, relative to the alleged misconduct of the bailiff, by the affidavit of his counsel, whose statements were based merely upon information and belief, and by the affidavits of Jesse F. and Albert Miller, who each claimed to have been in the sheriff's office at the time and overheard the conversation between the juror and the bailiff. The evidence presented by appellant by these several affidavits in support of the issue upon his part was controverted by the State by the affidavits of George H. Wenigar, the bailiff in question, and W. H. Harter, the sheriff. The latter states in his affidavit that he had no authority from the judge to carry any information to the jury, or to any member thereof, and that he did not request the bailiff to inform the juror what it was claimed by defendant that he did relative to keeping the jury together unless they agreed. The sheriff further deposed that, at the time it was alleged that the bailiff was communicating with the juror, that the door of the sheriff's office opening into the corridor was closed, and that neither he nor any other person in his office saw the juror, or heard what was said between the latter and the bailiff at the time of the conversation. Wenigar, the bailiff, states that he was in charge of the jury on the occasion in controversy; that on the afternoon of Saturday, January 8, 1898, when the jury was occupying the court room, he was called "by a knock on the door" leading from that room out into the corridor; that the juror did not request to see the judge, but simply stated to him that the jury could not agree; that all he said in response to this statement was, "The judge said you had to decide;" that no request was made by the juror that the judge be sent for; and that he, the bailiff, made the remark which he did of his own accord, without instructions from the judge to do so, and without request from the sheriff or any other person.

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It is insisted that the communication which appellant claims was made to the juror must be presumed to have served in coercing the jury into returning the verdict which they did, and that, therefore, appellant was prejudiced thereby and is entitled to a new trial. There is a difference, or conflict, between the evidence presented to the trial court on the part of the appellant to support the issue involved and that given by the State to refute or rebut it. If the lower court considered the statements made by the sheriff and the bailiff as the more credible, under the circumstances, the question is reduced to the bare fact that the bailiff, without any direction from the judge or sheriff, and solely on his own account, informed the juror that the judge had said that the jury "had to decide." There is nothing which discloses that the remark, which the bailiff admits he made to the juror, which was not made in the presence or hearing of the other members of the jury, was ever communicated by this juror to any of his associates. To presume that it was so communicated by him, and that it exerted, or even tended to exert, such an influence over the jury as to cause them to return, under the evidence, a verdict against appellant more unfavorable to him than they otherwise would, would certainly be an unwarranted stretch of judicial presumption.

The evidence presented upon the question of the alleged misconduct, as we have said, was conflicting, and its weight and force, therefore, became a matter to be determined solely by the trial court. The latter, under the circumstances, had better opportunities and means of testing the credibility of the statements made by the several affiants, and thereby ascertaining the truth in regard to the matter under investigation, than we have; and, by overruling the motion for a new trial, the court in effect decided the issue raised adversely to the contention of appellant, and, there being evidence which fully sustains its decision upon that issue, we, in obedience to the well settled rule of appellate procedure, must abide by its ruling. See *Weaver v. State*, 83 Ind. 289; *Doles*

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*v. State*, 97 Ind. 555; *Keyes v. State*, 122 Ind. 527; *Smith v. State*, 142 Ind. 288; *Hauk v. State*, 148 Ind. 238.

Again, upon another view of the question, were it conceded that the alleged misconduct was of a character which might vitiate the verdict, still it is not disclosed whether or not appellant or his counsel obtained information in regard to such misconduct, before or after the return of the verdict. If appellant had knowledge before its return, it was manifestly his duty to make complaint to the court, and interpose his objections in due season, and not wait until the jury had returned what he might consider an unfavorable verdict, and then challenge it upon the ground of the alleged misconduct. If he had knowledge prior to the return of the verdict in regard to the alleged misconduct, he, at the first opportunity, certainly ought to have informed the court of the fact, in order that it might have an opportunity to remedy the harm done, if any, by an instruction to the jury, or, if it were deemed necessary under the circumstances, to withdraw entirely the submission of the case from the jury. Where a party fails to interpose seasonable objections in regard to alleged misconduct before a return of the verdict against him, without showing a sufficient excuse for such failure, it will be presumed that he acquiesced therein, and thereby waived his right to complain; and under such circumstances, he will not be heard, after the return of the verdict, to make complaint for the first time relative to such misconduct. *Waterman v. State*, 116 Ind. 51, and cases there cited; *Reed v. State*, 141 Ind. 116, and cases cited.

We discover no error in the record upon the questions presented, and the judgment is therefore affirmed.

Howard, J., concurs in result, but doubts the correctness of the holding as to bailiff's communication to the jury. He thinks that, if the case had been doubtful on the evidence, the judgment should be reversed for the misconduct of the bailiff.

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**NATHAN, EXECUTOR, ET AL. v. LEE, RECEIVER, ET AL.**

[No. 18,234. Filed February 24, 1899.]

**MORTGAGES.—Deeds.—Governed by Law of Situs of Realty.**—Mortgages or conveyances of real estate are governed by the law of the *situs* of the realty, and all questions relating to the validity thereof are determined according to that law, and not according to the law of the domicile of the contracting parties. *p. 232.*

**CORPORATIONS.—Foreign Corporations.**—The restrictions or prohibitions contained in the charter of a foreign corporation, or those of the governing laws of the state where it is organized, in relation thereto, are recognized and enforced in other jurisdictions, and not the general legislation or judicial decisions of the state in which such corporation is organized. *p. 232.*

**COURTS.—Assignment for Benefit of Creditors.—Preferences.—Insolvent Corporations.—Decisions of Courts of Sister State.**—A mortgage executed by an insolvent corporation of another state upon lands in this State to secure preferred creditors residing in the sister state will not be held invalid because of a decision of the supreme court of such state that an insolvent corporation cannot lawfully dispose of or encumber its property otherwise than for the equal benefit of all of its creditors, where such mortgage was not executed in violation of any statute of such state, nor in violation of any construction placed upon any statute of such state by its highest court. *pp. 239, 240.*

**CORPORATIONS.—Preference of Creditors.—Insolvency.**—An insolvent corporation, in like manner as an insolvent natural person, may execute a mortgage upon its property for the purpose of securing preferred creditors. *p. 239.*

**ASSIGNMENT FOR BENEFIT OF CREDITORS.—Mortgages.**—A mortgage executed by an insolvent corporation on lands in this State to secure preferred creditors is not a part of a deed of assignment made by mortgagor, where the deed of assignment was declared invalid as to the mortgaged property. *pp. 240, 241.*

**CORPORATIONS.—Mortgage to Secure Preferred Creditors.—Insolvent Foreign Corporations.**—An insolvent foreign corporation may mortgage its lands in this State to secure a *bona fide* antecedent debt to a preferred creditor, where such action is not prohibited by the statutes of the foreign state. *pp. 241-244.*

From the Dearborn Circuit Court. *Reversed.*

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*Gustavus Wald, Givan & Givan and Stephens, Lincoln & Smith, for appellants.*

*G. M. Roberts, C. W. Stapp, Thornton M. Hinkle and F. W. Hinkle, for appellees.*

JORDAN, J.—Appellee is the receiver of the G. Y. Roots Company, a foreign corporation, incorporated under the laws of the state of Ohio, and, prior to the suspension of its business, as hereinafter stated, its principal office was located at the city of Cincinnati, Ohio. The purpose for which this corporation was created was to manufacture, purchase, and deal in flour, grain, salt, and other merchandise, for profit. To further the object of its incorporation, it became the owner of and operated a large flouring mill and cooper shops, situated on certain described real estate in the city of Lawrenceburg, Dearborn county, Indiana. In 1893, Samuel Strasburger, a resident of Cincinnati, Ohio, loaned to this company, at different times, money amounting in the aggregate to \$14,000 and over. This money was used by the company in carrying on its business. These several loans were evidenced by certain promissory notes executed by said company to Strasburger in 1893, payable to him at the city of Cincinnati, Ohio. In 1894, the company also borrowed of Rosa E. Levi, a resident of Cincinnati, Ohio, and one of the appellants in this appeal, money to the amount of \$5,000 which was also used by the company in its business, and, for the several sums so loaned by her, the company executed its promissory notes, payable to her at Cincinnati, Ohio. On August 6, 1895, these notes of Strasburger and Levi were unpaid, and on that day the G. Y. Roots Company was insolvent, having contracted debts and liabilities amounting to \$400,000, while its assets, at the same time, amounted in value to \$140,000. On said day, it had virtually ceased to be a going concern, but was still in the possession and control of all of its property, but contemplated making a voluntary assignment for the benefit of its creditors.

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On the said 6th day of August, at its office at Cincinnati, Ohio, in order to secure the payment of the notes held by Strasburger and Levi, for the money loaned, the company, by order of its board of directors, executed to each of these two creditors a mortgage upon its real estate, on which its mills and shops were situated in Lawrenceburg, Dearborn county, Indiana. These mortgages were in accordance with the form prescribed by the laws of Indiana, and were duly recorded, after their execution and acknowledgment, in the recorder's office of said Dearborn county, on said 6th day of August, 1895. On the same day, after the execution of these mortgages, this company under the insolvent laws of the state of Ohio, made what purported to be a voluntary assignment to Edwin M. Lee, as its assignee, of all of its property. It also, on the same day, executed a special deed of conveyance wherein it was recited that the said company conveyed and warranted to Edwin M. Lee its real estate, describing it, situated in Lawrenceburg, Dearborn county, Indiana, to be held by him in trust for the benefit of its creditors; the real estate described in this latter deed being the same which the company had previously mortgaged to Strasburger and Levi. On February 22, 1896, in an action instituted by certain creditors of this company, in the circuit court of Dearborn county, Indiana, appellee, Lee, was by said court appointed receiver of the said insolvent company, and duly qualified as such, and thereupon, by permission of that court, he instituted this action therein, making Strasburger, then in life, and Levi, together with the said G. Y. Roots Company and its said assignee, under its general and special assignments, parties defendant to the action. The receiver, by his action, invoked the judgment of the court in his favor as follows: (1) To set aside the mortgages executed by the said company on August 6, 1895, to Strasburger and Levi. (2) To set aside and have declared null and void, the two assignment deeds heretofore mentioned, made by the company on the said 6th day of August, so far as the same or either of them sought to assign

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or transfer the property of the company, situated in Dearborn county, Indiana. (3) That the court order the said Dearborn county real estate sold, freed from the said mortgage liens, and in the event the said liens should be held valid, that the same attach to the proceeds arising out of the sale of the said mortgaged premises, etc.

All the parties appeared to this action and filed their answers thereto, and the matters and things involved under the issues so joined were submitted to the court for its judgment. The only question, however, which the court adjudicated upon this complaint of the receiver was that which related to the validity of the deeds of assignment, so far as the same affected the property situated in Dearborn county, Indiana, and embraced in the mortgages of Strasburger and Levi. Upon this question, the court found and adjudged that the said deeds of assignment were invalid, and did not convey any right, title, or interest to the assignee in or to the property of the company situated in Dearborn county, Indiana, and further decreed that the said deeds of assignment be set aside and held for naught, and that the title to the said property be held to be as fully and effectually in said company, at the time of the appointment of the receiver by the Dearborn Circuit Court, as if such deeds of assignment had not been made. After the rendition of this judgment, Strasburger and Levi each filed a cross-complaint in the said action against the receiver, wherein they set up the notes which each held against the said Roots Company and also the mortgage executed by it to each of the cross-complainants, on the 6th day of August, 1895, to secure the payment of said indebtedness.

The relief which each sought by his respective cross-complaint, was to enforce the mortgage lien against the premises, and each cross-complainant prayed that the respective lien of each, under his mortgage, be protected by the court in the distribution of the proceeds arising out of the

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sale of the said mortgaged premises. After the filing of his cross-complaint, Samuel Strasburger died, and appellant Nathan, as his executor, was substituted as a party in his place and stead. The receiver then filed his answer to each of these cross-complaints, whereby he sought to defeat the mortgages and have them adjudged invalid by the court upon the grounds that they were each executed by the said company as a preference to said complainants, at a time when the company had become insolvent, and had decided to make an assignment of its property for the benefit of its creditors, and that, therefore, by the laws of Ohio, under which the company had been incorporated, as construed by the supreme court of that state, it was forbidden, under the circumstances, to execute the mortgages in controversy, and the prayer was that each of these instruments be declared invalid, and that the cross-complainants take nothing thereunder.

The answer of the receiver to each of the cross-complaints was held sufficient upon demurrer, and the said complainants replied by the general denial, and the cause being at issue between the said parties, was submitted to the court for trial and upon the evidence the court found for the receiver upon the issues joined upon the cross-complaints of Strasburger and Levi, to the effect that the mortgages in controversy were invalid, and did not constitute a lien upon the real estate therein described, nor a valid charge against the proceeds arising out of the sale of the mortgaged premises, and, over the separate motions of appellants for a new trial, wherein they each assigned, among others, as reasons therefor, that the finding of the court was contrary to law and also contrary to the evidence, the court adjudged and decreed the mortgages to be invalid, and that they be set aside and held for naught.

From this judgment appellants have appealed to this court, and their separate assignment of errors calls in question the ruling of the court upon the demurrers to the answer of ap-



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pellee to the cross-complaint, and also the overruling of their respective motions for a new trial. The evidence is in the record and it discloses, among others, the facts heretofore stated. What might be denominated the charter of the corporation in question, or, rather, the governing laws of the state of Ohio relative to the creation of corporations, under which this company seems to have been incorporated and controlled, were introduced in evidence by the appellee. In addition to these statutes, the opinion of the supreme court of that state, in the case of *Rouse v. Merchants Nat. Bank*, decided June 18, 1889, and reported in 46 Ohio St. at page 493, 22 N. E. 293, 5 L. R. A. 378, was given in evidence upon the trial, by the appellee. The holding of the supreme court of Ohio in that appeal was to the effect that a corporation organized for profit, under the laws of Ohio, after it had become insolvent and had ceased to prosecute the object for which it was created, could not, by giving some of its creditors mortgages upon its corporate property, to secure the payment of antecedent debts, create a valid preference in their favor over other creditors of the insolvent corporation, or, over a general assignment thereafter made by such corporation for the benefit of its creditors.

The contention of counsel for appellee, in the main, is that, as the G. Y. Roots Company was an Ohio corporation, it was governed by the laws of that state; that the laws of Ohio prohibited it from executing the mortgages to appellants, under the circumstances, as it did; and that these laws must be given force and effect by the courts of Indiana. Hence it is insisted that the right of appellants to enforce the mortgages in dispute was properly denied by the lower court. The question, as counsel for appellee propounded it, is, can this foreign corporation prefer appellants, in the execution of these mortgages, over its other creditors, when its right to do so is denied by the laws of its domicile and where, as in this case, the persons seeking to enforce their rights, under the preference given, are citizens of the same state

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under whose laws the corporation was created? Reduced to a single or simple proposition, the contention of counsel for appellee is that these mortgages were executed in violation of the charter of the company or governing laws of Ohio relative to corporations like the one in controversy, as such charter or laws have been construed or interpreted by the supreme court of that state in its decision in the case of *Rouse v. Merchants Nat. Bank*, 46 Ohio St. 493, and that the decision of the court in that case is as operative and controlling, under the circumstances, in Indiana as it is in Ohio, and that the rules of comity required the Dearborn Circuit Court to accept the principle or rule therein asserted as controlling upon it, and by reason thereof adjudge, under the facts, the mortgages in controversy to be invalid, and deny appellants' right to enforce them.

Counsel for the respective parties in this appeal have favored us with able and elaborate briefs in which they have cited numerous authorities which, as it is insisted, support the proposition which each advances. It would, however, unnecessarily extend this opinion were we to review or comment upon all of the cases referred to; hence, we content ourselves with such authorities as support the principles which, in our opinion, are controlling upon the questions involved in this cause. It is a well affirmed general rule, that the laws of a sister state, which either give or deny the power to contract, have no extra-territorial force or effect where the particular contract involved relates to the conveyance or encumbrance of lands situated in another state or jurisdiction. *Cochran v. Benton*, 126 Ind. 58, and authorities there cited. Such conveyances or encumbrances are considered as being governed by the law of the *situs* of the realty, and all questions relating to the validity thereof are to be determined according to that law and not according to the law of the place of the contract or of the domicil of the contracting parties. 6 Thompson on Corp., section 7721; Jones on Mort., section 823; Wharton on Conflict of Laws, sections

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273, 274; *Boehme v. Rall*, 51 N. J. Eq. 541, 26 Atl. 832, and authorities there cited.

Another rule is that it is the restrictions or prohibitions contained in the charter of a foreign corporation or those of the governing laws of the state where it is organized, in relation thereto, which follow it into another state. It is such restrictions or prohibitions, as a general principle, and these alone, which, under the rules of comity, are recognized and enforced in other jurisdictions, and not the general legislation or judicial decisions of the state in which such corporation is organized. The general laws, regulations or decisions of the courts of a sister state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions. 2 Morawetz on Corp., section 967; *Warren v. First Nat. Bank*, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746, and cases there cited; *Boehme v. Rall*, *supra*; *Borton v. Brines-Chase Co.*, 175 Pa. St. 209, 34 Atl. 597.

We have examined the statutes of Ohio, introduced in evidence, which relate to corporations organized thereunder, and we discover nothing therein which can be said to forbid or prohibit an insolvent corporation of that state from mortgaging its corporate property or assets to secure a *bona fide* antecedent indebtedness of its own and thereby prefer one or more of its creditors over others. If it appeared in this case that the mortgages in question were executed in violation of the express provisions of any of these statutes or that the power or right of the company to execute the mortgages depended upon a construction placed upon a statute of that state by its highest court, quite a different question would be presented for our decision. That an insolvent corporation, in like manner as an insolvent natural person, may, at common law, execute a mortgage upon its property to some of its creditors, and thereby create a preference, is a well settled proposition. See Cook on Stock and Corporation Law, section 779; Angell & Ames on Corp., section 187, page 168; 2

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Morawetz on Corp., section 802; 1 Beach on Corp., section 358; *Levering v. Bimel*, 146 Ind. 545. Blackstone, in his commentaries, asserts that it is necessarily and inseparably incident to every corporation aggregate that it has the power to sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as may a natural person. 1 Blackstone's Commentaries (Cooley's ed.) \* page 475. In 2 Cook on Corp., section 691, it is said: "Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment, the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes. A preference by the directors of themselves is generally held to be fraudulent." By section 3879 R. S. 1881, section 5098 Burns 1894, the legislature of this State has removed all doubt as to the right or power of a foreign corporation, organized for a like purpose as the one in this case, to acquire lands in this State and mortgage the same. This statute is an affirmative permission by the State to foreign corporations, organized for manufacturing and mining purposes, to purchase and hold real property in this State for the purpose of its business and to convey or mortgage the same, as corporations of this State, organized for similar purposes, may do. It is true that this statute is not intended to confer any power or right upon a foreign corporation which is denied to it by its charter or the governing laws of the place of its organization and domicil. As to the rights mentioned in the statute cited, it is simply permissive and may be said to be but a recognition of the rules of comity existing between sister states. There is no question but what the indebtedness secured by these mortgages is a legitimate and *bona fide* one in all respects and is such as the company was fully authorized, under the laws of Ohio, to contract or incur. Neither can it be said that a preference, created thereby in favor of Strasburger and Levi, was

a part of the assignment made by the company on August 6, 1895. That assignment, as we have seen, was adjudged by the lower court to be invalid, and of no effect, so far as it attempted to assign or transfer property owned by the company situated in Dearborn county, Indiana; and the mortgaged premises apparently remained under the dominion of the company, after the execution of the mortgages, for a period of over six months, until the appointment of the receiver by the Dearborn Circuit Court on February 22, 1896. The power of this corporation, under the circumstances, to make the mortgages and thereby prefer these creditors over others, is not prohibited, as we have seen, by the statutes of its own state; neither is it denied by the rules of the common law nor the laws of this State. The *situs* of the mortgaged premises being in Indiana, it is evident, under the circumstances, that the parties to the mortgages, at the time of their execution, must have contemplated their enforcement, if necessary, in the courts of this State. If these mortgages are to be adjudged invalid and the right of appellants to enforce them denied by the courts of this State, these results must follow by virtue of the rule announced and adopted by the supreme court of Ohio in *Rouse v. Merchants Nat. Bank*, 46 Ohio St. 493. In that decision, the court did not construe or interpret any statute of that state in relation to the execution of a mortgage by an insolvent corporation. The court therein expressly recognized the fact that decisions of the higher courts of other jurisdictions are conflicting in respect to the question in dispute in that appeal, and the court expressly admits that it is one of first impression so far as that court is concerned, and therefore, it is said, that it is at liberty to adopt the rule which, in its judgment, best coincides with justice and right. The rule adopted by the court in the case in question, and the one which controlled the question therein involved, is but an application of the equitable principle which arises out of what is denominated "The trust fund

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doctrine." The foundation upon which this rule or doctrine, as recognized in the Rouse case, and which now prevails in Ohio and other states, is said to rest, is that the assets or property of a corporation, when it becomes insolvent and has ceased to be a going concern, *eo instante* become a trust fund for the benefit of its creditors and, under the circumstances, its officers, being trustees for all of its creditors, cannot lawfully dispose of or encumber the property otherwise than for the equal benefit of all of its creditors. This doctrine or rule does not prevail in this jurisdiction and this court has declined to accept or enforce it. See *Henderson v. Indiana Trust Co.*, 143 Ind. 561; *First Nat. Bank, etc., v. Dovetail, etc., Co.*, 143 Ind. 534; *Levering v. Bimel*, 146 Ind. 545; *First Nat. Bank, etc., v. Dovetail, etc., Co.*, 143 Ind. 550. In the case last cited, on page 553 of the opinion, this court said: "The expression that 'the property of a corporation constitutes a 'trust fund' for its creditors,' only means that when the corporation is insolvent and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but as between the corporation itself and its creditors, the corporation does not hold its property in trust or subject to a lien in favor of the creditors in any other sense than does an individual debtor." In the appeal of *Levering v. Bimel*, 146 Ind. 545, on page 553 of the opinion, we said: "As between the corporation and its creditors, it cannot, in reason, be said that the relation is anything more than that of debtor and creditor. The relation of trustee and *cestui que trust* does not exist so as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor." While the decision of the Ohio court, in the case in controversy, is controlling in that jurisdiction upon like questions, when presented, it, as we have seen, can have no extra-territorial effect. It has merely a local application, and the courts of this State are not required to follow it and, by reason thereof, de-

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clare invalid the mortgages in dispute, and deny appellants' right to enforce them. In addition to the authorities heretofore cited on this point, see *Rhawn v. Pearce*, 110 Ill. 350.

While we may and do yield great respect to the decisions of the supreme court of Ohio, still we are not bound to accept them as governing us in the administration and application of legal or equitable principles. It is true that the construction placed upon a statutory law by the courts of its own state, will, by virtue of the rules of comity, be followed by the courts of a sister state in cases in which such statute may be involved, but, as heretofore stated, the construction of a statute was not involved in the Rouse case, but the question presented to the court in that appeal depended for its solution upon the view which the court might take in regard to the equitable rule or trust fund doctrine. It is certainly manifest and well supported by authority that neither the principles of equity nor the common law, as they may be expounded by the supreme court of Ohio, are binding upon this court, but, in the administration of justice, we must adhere to and follow our own decisions or precedents in which such principles are exposed or expounded so far, at least, as we consider such decisions sound and correct. This rule is well affirmed by the courts of other states. *St. Nicholas Bank, etc., v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241, and cases there cited.

The fact that the creditors in this cause are nonresidents of this State, and citizens of the state of Ohio, can exert no influence over the question as here presented. By the rule approved by this court in *Catlin v. Wilcox, etc., Co.*, 123 Ind. 477, 8 L. R. A. 62, it is asserted that when a citizen of another state is once properly in court and accepted as a suitor, neither the law nor the court administering the law, will admit any distinction between such a suitor and one who is a resident or a citizen of its own state. "Before the law and its tribunals, there can be no preference of one over the other."

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Tested by the rules prevailing in this State, as expounded and settled by our own decisions, relative to the validity of mortgages given in good faith by an insolvent corporation upon its corporate property, to secure a *bona fide* antecedent indebtedness, we are constrained, under the facts, to uphold the validity of the mortgages in controversy. Under the evidence, the judgment of the lower court ought to have been in favor of appellants upon the issues tendered by the cross-complaints. The judgment rendered by the trial court in favor of appellee upon the issues joined upon appellants' cross-complaints, is therefore reversed, and the cause is remanded to the lower court with instructions to grant appellants a new trial and for further proceedings not inconsistent with this opinion.

Baker, J., did not participate in this decision.

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BONDURANT ET AL. v. ARMEY ET AL.

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[No. 18,828. Filed March 7, 1899.]

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**DRAINS.—Construction in Two or More Counties.—Jurisdiction of County Commissioners.**—Where a petition was filed in Kosciusko county for the construction of a ditch having its source in Kosciusko county and its terminus in Marshall county, and for an arm of such ditch having its source in St. Joseph county, the petition in so far as it relates to the construction of the arm was properly dismissed for want of jurisdiction, under section 24 of the act of April 21, 1881. *pp. 246, 247.*

**SAME.—Construction in Two or More Counties.—Joint Session of County Commissioners.**—Where a petition filed for the construction of a ditch extending into two counties, and for an arm of such ditch extending into a third county, was dismissed in so far as it related to the construction of the arm, it was not necessary in a joint session of the county commissioners that the third county be represented. *pp. 247, 248.*

**SAME.—Failure of Viewers to Report.**—Where viewers were appointed and ordered to report on a proposed drain at the March term of court, but, with the knowledge and acquiescence of the petitioners, did not report until the September term, an extension of time for good cause shown having been granted both at the March and the June terms, does not amount to an abandonment of the petition. *p. 248.*



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Bondurant v. Arney.

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From the Elkhart Circuit Court. *Affirmed.*

*Charles P. Drummond*, for appellants.

*S. J. North, J. H. Brubaker, J. M. Van Fleet and V. W. Van Fleet*, for appellees.

HADLEY, J.—This proceeding was begun before the county commissioners for the construction of a public ditch, under the act of 1881, in the counties of Kosciusko, St. Joseph and Marshall. The petition was filed by appellees November 22, 1894, in the office of the auditor of Kosciusko county, the county containing the head and source of the proposed ditch, as required by section 5677 Burns 1894, section 4308 Horner 1897. The petition prayed for the construction of a main ditch, having its source in Kosciusko county and terminus in Marshall county, and for an arm having its source in St. Joseph county and terminus in the main ditch in Marshall county.

Such proceedings were had thereon that, on the 4th day of December, 1894, three viewers were appointed to meet three viewers each from St. Joseph and Marshall counties, on the 12th day of December, 1894, to commence the view, and were ordered to file their report in each county at least four weeks before the regular March term of commissioners' court 1895. At the March term, 1895, the viewers appeared, and represented to the commissioners, that on account of deep snows, inclement weather, and other causes, they had been unable to complete the view, and requested further time to make their report. Time was granted until the June term following, and a transcript of the request and order sent to Marshall and St. Joseph counties. At the June term following, of the board of commissioners of Kosciusko county, the petitioners dismissed their petition, so far as it related to the construction of the arm having its source in St. Joseph county. And at the same term, the viewers again reported their inability to complete the view, and make their report at that term, and thereupon the commissioners granted

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them till the September term to make their report. A transcript of the order of continuance was sent to the commissioners of Marshall county.

September 3, 1895, the viewers filed their report, pending which appellants filed their remonstrance and the commissioners of Kosciusko county set the remonstrance for hearing September 11, 1895, and requested the board of commissioners of Marshall county to meet and set, conjointly with them, in the hearing of said remonstrance. September 11th the board of commissioners of each of the counties of Kosciusko and Marshall met, and, while sitting jointly in said cause in Kosciusko county, appellants moved the dismissal of the petition, and an abatement of said ditch proceedings, which motion was sustained by said joint session, and said petition was dismissed. From the judgment, dismissing their petition, appellees appealed to the Kosciusko Circuit Court, and filed their appeal bond, approved as required by law. The cause was sent by the Kosciusko Circuit Court, on change of venue to the Elkhart Circuit Court. In the Elkhart Circuit Court, appellants renewed their motion to dismiss the petition for want of jurisdiction, which motion was overruled, and final judgment thereon, that said cause be remanded to the board of commissioners of Kosciusko county, with instructions to set aside the order dismissing said petition and for further proceedings.

The action of the Elkhart Circuit Court, in overruling appellants' motion to dismiss appellees' petition, is the only question properly presented for decision. Appellants' chief contention is that the dismissal of appellees' petition by the commissioners of Kosciusko county, at their June term 1895, so far as the same related to the construction of the arm having its source in St. Joseph county, carried with it the integrity of the whole petition for a ditch; that the proposed main ditch, and its St. Joseph arm, constituted a single ditch, and an abandonment of the arm, in legal effect, was an abandonment of the whole proceeding. We cannot agree with

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appellants in this contention. The main ditch described as having its source in Kosciusko county, and mouth or terminus in Marshall county, would carry a volume of water, distinct and independent of the ditch proposed to have its source in St. Joseph county. Because the latter is described as an arm of the former, does not deprive it of its character as a ditch, and because it empties its waters into the channel of the former, can make no difference. The Ohio is a tributary of the Mississippi but none the less a river, and the Mississippi is a river independent of its tributary. Likewise, a ditch may be an arm, but none the less a ditch, and if the jurisdiction over the entire ditch shall be in the county of its source, and we have in one petition a prayer for two ditches, each with a separate and independent source in different counties, which court shall have the jurisdiction? It is clear that the legislature never intended any such question to arise.

The original petition, as filed, was subject to legal objection for the very reason that it proposed the construction of two ditches with separate and independent sources, in different counties, and presenting the absurd proposition of giving to the commissioners of Kosciusko county jurisdiction over the drainage of lands in St. Joseph and Marshall counties, by a ditch that in no sense aided, or affected in any way, the drainage of lands in the former county. If to effect the drainage of lands in St. Joseph county, it was necessary to construct a channel into Marshall county, that could be of no possible concern to the commissioners of Kosciusko county, and was a subject over which they had no jurisdiction. It follows, therefore, that the dismissal by the commissioners of Kosciusko county of that part of appellees' petition that related to the construction of the arm in St. Joseph and Marshall counties, injured no one, and was only a formal renunciation of a jurisdiction they never had, and in no way impaired the validity of the petition for the construction of the main ditch.

It is next insisted that after the consideration of the peti-

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tion and appointment of viewers, there was no joint action by the commissioners of Kosciusko, St. Joseph, and Marshall counties, and hence no legal action. The record shows that after the report of the viewers had been filed in September, 1895, the commissioners of Kosciusko and Marshall county met, and the joint session entertained and sustained appellants' motion to dismiss appellees' petition. It was entirely immaterial that the commissioners of St. Joseph county failed to join. In fact, it would have been improper to have permitted them to take part in such joint session.

Finally, it is urged that the motion to dismiss the petition should have been sustained for the reason that the viewers failed to make their report four weeks before the March term, 1895, as ordered by the commissioners, and failed thereafter to make it until the September term, 1895, and that such failure, with the knowledge and acquiescence of the petitioners, was in law an abandonment of their petition. There is no merit in this contention. The record shows that the viewers at each, the March and June terms, petitioned the commissioners for an extension of time for good cause shown, and if they had found it impossible to complete their work, for the reasons stated, rather than being in default, they did exactly what the law required them to do. *Bohr v. Neuenschwander*, 120 Ind. 449. And it has been frequently held that a litigant shall not be prejudiced by the failure of others to do their duty. *Denton v. Thompson*, 136 Ind. 446-451, and cases cited.

The circuit court committed no error in overruling appellants' motion to dismiss appellees' petition, and remanding the cause to the commissioners of Kosciusko county, with instructions to set aside their order dismissing said petition and for further proceedings. We find no error in the record.

Judgment affirmed.

Baker, J., was absent.

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## ANDERSON ET AL. v. JOHNSON ET AL.

[No. 18,396. Filed March 8, 1899.]

**HIGHWAYS. — Change of Location. — Railroad Crossings. — Instructions.**—In the trial of an action to change the location of a public highway, which had been established, but not opened, the court in one instruction told the jury that the highway proposed to be vacated must cross the railroad at grade and not under it; in another that such highway may be carried under the railroad, if that be the most convenient manner of crossing; and in another instruction informed the jury that it could not be judicially determined what kind of a crossing will be constructed across the railroad on the line of the highway sought to be vacated. The highway sought to be vacated, as shown in the petition therefor, crosses the railroad at grade. *Held*, That the first instruction correctly stated the law, and that the second and third were in direct conflict therewith, and erroneous. *pp. 249-251.*

**SAME. — Establishment. — Petition. — Railroad Crossing.**—Where a petition for the establishment of a public highway which crosses a railroad right of way does not ask for a crossing under the tracks, it will be held to be a petition for the location of a highway to cross the railroad tracks at grade, where the construction thereof under the railroad would require the removal of a fill and the construction of a bridge or other support for the tracks. *p. 251.*

From the LaPorte Circuit Court. *Reversed.*

*John H. Bradley*, for appellants.

**MONKS, C. J.**—It appears from the record that a public highway had been established by the board of commissioners of LaPorte county, but that the same had never been opened and worked, and that this proceeding was brought by appellants to change the location of said highway. The highway sought to be vacated, called the "West Road," and the proposed highway, called the "East Road," cross the track and right of way of a railroad, but at different places. This is the second appeal of said cause. *Johnson v. Anderson*, 143 Ind. 493. After the cause was returned to the court below, the same was tried by a jury, and a verdict returned in favor of appellees, and over a motion for a new trial a judgment was

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rendered against appellants. The only error assigned calls in question the action of the court in overruling appellants' motion for a new trial.

It is insisted that the instructions given by the court to the jury were so inconsistent and conflicting that they confused and misled the jury, instead of aiding them in arriving at a verdict. By the fifth instruction given at the request of the appellants, the court informed the jury that the highway established by the board of commissioners, known as the "West Road," crossed the railroad at grade, and not over or under the tracks.

The court also gave instructions four and six asked by appellees, as follows: (4) "If the condition of the grade of the railroad and of the ground on each side thereof is such at the intersection of the line of either of the highways proposed to be vacated or located that the best and most convenient manner of carrying said highway across the line of said railroad company's right of way would be by constructing a tunnel under the railroad, it would be proper for the crossing to be made in such a manner; and this you should take into consideration in determining the question as to the public utility of the proposed change."

(6) "In this case it cannot be judicially determined as to just what kind of crossing shall or will be constructed across the right of way of the railway company on the line of either the road proposed to be vacated, or the road sought to be located in lieu thereof, as stated in the petition; yet it is to be presumed that, when such a crossing is constructed, it will be done in a proper manner, so as to afford security to life and property, and not unnecessarily impair its usefulness, or injure the franchises of the railroad company."

The court, by said instructions, informed the jury that it is the law of the case: (1) The west highway—the one proposed to be vacated—must cross the railroad at grade, and not under it. (2) The west highway may be carried under the railroad, if that be the most convenient manner of cross-

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ing. (3) It cannot be judicially determined what kind of a crossing will be constructed over the right of way of the railroad company on the line of the west highway proposed to be vacated.

The evidence shows that at the point where the west highway—the one proposed to be vacated—crosses said right of way there is a fill, and that at a point ten feet north of the north line of the right of way the ground is about eleven feet below the railroad track or grade, and at the south line of the right of way the ground is about fifteen and fifty-one hundredths feet below the said grade.

Where the east or proposed highway crosses the north line of the right of way the ground is eight and fifty-one hundredths feet below the grade, and where it crosses the south line of the right of way the ground is only a little lower than the grade.

To construct a crossing under the railroad track for the west highway would require the removal of the earth supporting the tracks to the width of the highway, and the construction of a bridge or other support for the tracks over said highway. In such case, unless the petition asks for an undercrossing, and the order establishing the highway provides therefor, the crossing is at grade. The petition in this case for the establishment of the east highway does not ask for a crossing under the tracks, and it is, therefore, a petition for the location of a highway to cross the railroad tracks at grade. The west highway—the one proposed to be vacated—as described in said petition, crosses the railroad tracks at grade. It follows that the fifth instruction correctly stated the law to the jury. The fourth and sixth instructions were in direct conflict therewith, and therefore erroneous.

The court erred in overruling the motion for a new trial. Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not in conflict with this opinion.

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155	308
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## PUGH v. HIGHLEY ET AL.

[No. 18,518. Filed March 9, 1899.]

**EXECUTION SALE.—Purchase by Judgment Creditor.—Secret Equities.**

—A judgment creditor who in good faith buys land at an execution sale on his own judgment takes the land free from prior secret equities of which he had no notice in like manner as a stranger purchaser. *Boling v. Howell*, 89 Ind. 329, *Petry v. Ambroscher*, 100 Ind. 510, *Tarkington v. Purvis*, 128 Ind. 183, *Orb v. Coapstick*, 136 Ind. 813, and *Shirk v. Thomas*, 121 Ind. 147, in so far as they may be deemed to affirm the contrary doctrine, are disapproved.

From the Grant Superior Court. *Reversed.*

*Moon & Wolf*, for appellant.

*B. T. St. John* and *W. H. Charles*, for appellees.

**BAKER, J.**—Suit to foreclose vendor's lien. Appellees conveyed lands to one Clayborn Highley and took his unsecured note therefor. Afterwards appellant recovered judgment against the grantee and caused execution to issue. The sheriff levied on the lands in question. At the sale, appellant was the purchaser. When the time for redemption expired, she received a sheriff's deed for the lands.

Complaint in two paragraphs. The first is silent concerning notice to appellant of appellees' equity. The second charges that appellant had notice before receiving the sheriff's deed. Appellant's several demurrers for want of facts were overruled. A demurrer was sustained to an answer of appellant's, in which she averred that she bid at the sale, paid the costs, and receipted the sheriff for the full amount of her judgment, without knowledge or notice of appellees' claim. Judgment for appellees after trial on issues completed by answers of general denial and payment and reply denying payment.

The question is: Does a judgment creditor, who in good faith buys at a proper execution sale on his own valid judgment, take the land subject to prior secret equities?



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The lien of a judgment attaches only to the actual interest of the debtor in the land. While the judgment remains unexecuted, the lien may be subordinated to any prior equity, though secret; for the creditor pays or surrenders nothing to or for the debtor, and continues to hold against the debtor his full claim, which the court has merely changed from a cause of action into a judgment.

A security for an antecedent debt will be upheld between the parties; but the taker will not be protected against prior secret equities, because he parts with nothing.

But a purchaser who pays the owner the value of the land takes the title clear of equities of which he has no notice.

And a creditor who, without notice, cancels a preëxisting debt in consideration of his debtor's conveying him land, is a good faith purchaser for value. To hold that the debtor may sell his land to a stranger and turn over the purchase price (money, notes, goods, land) to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities; and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities,—is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result,—using the land to pay the debt.

A good faith purchaser, other than the judgment creditor, at a proper execution sale on a valid judgment, who pays the sheriff the amount of his bid, acquires all the right, title and interest in the land sold (except redemption) that the judgment debtor could have conveyed to him by deed of bargain and sale. As to secret equities, he stands on the same footing with the good faith purchaser for value from the apparent owner of land. In both cases, the purchaser irrevocably parts with his money, relying and having the right to rely on getting not merely what the debtor actually owns, but what from the public records he apparently owns. In either case,—before the debtor himself conveys, or before the

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sheriff conveys for him,—the holder of the prior secret equity has had it in his power to prevent any one's being misled by the false situation. If either the subsequent purchaser or the holder of the secret equity must suffer or be postponed, it should be the latter, since his initiative made delusion by the debtor's apparent circumstances possible.

What, now, is the position of the judgment creditor who purchases at a proper execution sale on his own valid judgment? (The premises exclude the question of the effect upon the judgment creditor of irregularities in the proceedings.) The authorities holding that he is not a good faith purchaser for value seem to be based upon either or both of two propositions: that he has parted with nothing,—has not changed his position for the worse; and that he will not be permitted to urge a claim that rises higher than the source of his right (by that, meaning the lien of his judgment).

The judgment creditor purchaser has parted with value and has changed his position for the worse. He has paid to the sheriff the amount of his bid in cash, actually or constructively; for, if he merely receipts for payment of his judgment in whole or in part, the transaction in contemplation of law is the same as if he had paid the sheriff in cash and the sheriff had paid him in cash. His payment is just as irrevocable as that of a stranger purchaser. His right to vacate the satisfaction of the judgment is no greater than that of a stranger purchaser. (And under section 765 R. S. 1881, section 777 Burns 1894, section 765 Horner 1897, there can be no right of that kind in the present case, for defects in the proceedings and want of title in the debtor are excluded from the question, by the facts.) If the judgment creditor purchaser does not pay at the time of the sale, he is liable to judgment for the amount of the bid, and damages, interest and costs, like any other purchaser. Section 760 R. S. 1881, section 772 Burns 1894, section 760 Horner 1897.

He has also changed his position for the worse, if he is not to be permitted to hold under the execution sale the same as a

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stranger purchaser. The debtor may have directed the sheriff to levy upon the very land that was subject to the secret equity. Manifestly the judgment creditor without notice is ethically as innocent in bidding as is the stranger. By the sale, the execution becomes *functus officio* and the judgment creditor has lost the lien of his execution upon the goods and chattels of his debtor. By the sale, the judgment is satisfied *pro tanto* and the judgment creditor has lost the lien of his judgment upon the other lands of his debtor.

But, it is said, he may not urge a claim of higher value than the source of his right, that is, his judgment lien. Why not?

If an innocent stranger pays for a deed, he acquires the apparent title of the grantor and the holder of the secret equity will not be heard to say aught against it. That is, the purchaser gets more than the debtor had. Stronger than the innocent stranger's, however, are the equities of the judgment creditor purchaser without notice. For the holder of the secret equity has less opportunity to protect himself against the stranger than he has against the judgment creditor; since he may have no means of ascertaining, even by the exercise of the highest vigilance, to whom his secret trustee is about to convey, but it is only his own inaction that can prevent his learning of the judgment before sale,—in time to subordinate the lien to his rights. Shall equity offer a premium for sloth? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

If an owner of an antecedent debt cancels in good faith the obligation in consideration of a deed from his debtor, he takes the title free from secret equities. That is, the purchaser gets more than the debtor had. Shall the private, maybe secret, extinguishment of the debt be held of more exalted worth in equity than the law's public and open satisfaction thereof? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

If a stranger without notice buys at execution sale, his

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purchase cuts off secret claims against the land. That is, the purchaser gets more than the debtor had. The law does not prohibit, but, on the contrary, encourages the judgment creditor to bid; for it is in the interest of the law's execution of the judgment and to the advantage of the debtor that he should compete with the other bidders. If a stranger purchases, the sheriff pays over the money to the judgment creditor who thereby receives satisfaction out of property on which his judgment may not have been actually a lien. Shall equity accredit the circuitous, and discredit the direct, means to the same end? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

It is a misapprehension to say that the rights of a judgment creditor purchaser arise from the judgment lien and therefore continue subject to prior secret equities. His position as purchaser is in no sort of legal privity with his position as judgment creditor. When the sale is made, he ceases to be a judgment creditor. His rights thenceforward are those of a purchaser at execution sale. The contention that the rights of a purchaser at execution sale are one thing if he is a stranger and another if he is the judgment creditor is untenable in reason.

The decisions of this court, upon analysis, are found in conformity with these principles.

In *Catherwood v. Watson*, 65 Ind. 576, the facts were these: Daniel Watson bought land with his wife's money and took title in his own name. Subsequently Catherwood obtained judgment against one Mills on which Daniel became replevin bail. The land was sold on execution to satisfy the judgment and Catherwood purchased. Mrs. Watson sued to quiet title. Catherwood had no notice of her claim till after the execution sale. It was held that Catherwood was entitled to the land clear of Mrs. Watson's secret equity.

It appears in *Rooker v. Rooker*, 75 Ind. 571, that Samuel Rooker used money of his wife in buying land and took title

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in his own name. His wife had instructed him to buy the land for their daughter Mary. Samuel recognized the trust and made a will devising the land to Mary. In Samuel's lifetime the Farmers' Friend Manufacturing Company recovered judgment against Samuel and bought the land at execution sale on its judgment. The company had no notice of Mary's equities. Within the year of redemption, the company sold its certificate of sale to James Rooker, who knew about the claims of Mary. After James received a sheriff's deed, the guardian of Mary, her father having died in the meantime, brought suit to quiet title. It was decided that the company was a good faith purchaser for value, and that, the rights of the parties having been fixed by the execution sale, James's knowledge of Mary's equities at the time he bought the certificate was immaterial.

*Milner v. Hyland*, 77 Ind. 458. Hyland bought realty with his wife's money and took title in his own name. Milner and others recovered judgments against Hyland on which executions were issued and levied on the land. Milner became purchaser at the sheriff's sale, which was made in part to satisfy Milner's own judgment. By the decision, Milner was fully protected against the secret equity of Mrs. Hyland.

*Vitito v. Hamilton*, 86 Ind. 137. A mortgage was made to appellee, in which the land intended to be encumbered was not described. The same landowner later executed a mortgage to appellant, in which the same mistake occurred. Appellant brought suit against the mortgagor to reform and foreclose. Appellee was not a party. At the sale, appellant was the purchaser, without notice of appellee's equity. Subsequently appellee brought suit to reform and foreclose, but appellant was not a party. At the sale, appellee was the purchaser. Held, that appellant's purchase at his own sale cut off appellee's prior secret equity.

In the ejectment case of *Pierce v. Spear*, 94 Ind. 127, the title resulting from an execution sale at which the judg-

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ment creditor was the purchaser was determined to be the paramount one.

Decisions to the same effect in other jurisdictions abound. *Tennant v. Watson*, 58 Ark. 252, 24 S. W. 495; *Newman v. Davis*, 24 Fed. 609; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Riley v. Martinelli*, 97 Cal. 575, 21 L. R. A. 33, 33 Am. St. R. 209, 32 Pac. 579; *Doyle v. Wade*, 23 Fla. 90, 1 South. 516; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Holloway v. Platner*, 20 Iowa 121, 89 Am. Dec. 517; *Butterfield v. Walsh*, 21 Iowa 99; *Walker v. Elston*, 21 Iowa 529; *Ettenheimer v. Northgraves*, 75 Iowa 28, 39 N. W. 120; *Parker v. Prescott*, 87 Me. 444, 32 Atl. 1001; *Woodward v. Sartwell*, 129 Mass. 210; *Luton v. Soper*, 94 Mich. 202, 53 N. W. 1054; *Adams v. Buchanan*, 49 Mo. 64; *Condit v. Wilson*, 36 N. J. Eq. 370; *Voorhis v. Westervelt*, 43 N. J. Eq. 644, 12 Atl. 533; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Wood v. Morehouse*, 45 N. Y. 368, 376; *Barto v. Bank*, 15 Hun 11; *Paine v. Mooreland*, 15 Ohio 435; *Sternberger v. Ragland*, 57 Ohio St. 148, 48 N. E. 811; *Grace v. Wade*, 45 Tex. 529; *Reynolds v. Haskins*, 68 Vt. 426, 35 Atl. 349; *Bayley v. Greenleaf*, 7 Wheat. 46. The decisions in Arkansas, Florida, Illinois, New Jersey and Texas apparently are controlled by statutes ranking judgment creditors with subsequent purchasers for value.

The cases of *Gifford v. Bennett*, 75 Ind. 528, *Wert v. Naylor*, 93 Ind. 431, and *Adams v. Vanderbeck*, 148 Ind. 92, holding that stranger purchasers at execution sales and cancelers of antecedent debts, without notice, are innocent purchasers, are also authoritative in principle. The statements in *Boling v. Howell*, 93 Ind. 329, *Petry v. Ambroscher*, 100 Ind. 510, *Tarkington v. Purvis*, 128 Ind. 182, and *Orb v. Coapstick*, 136 Ind. 313, in so far as they may be deemed to affirm that the holder of an antecedent debt who cancels his claim for a conveyance of land from his debtor takes subject to secret equities of which he had no notice, are disapproved.

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Against the decisions in which was directly involved the very question that arises in the present appeal, no authority to the contrary in this State has been cited, nor has an extended investigation discovered one. There are, however, several instances of *obiter dicta*.

In *Rooker v. Rooker*, 75 Ind. 571, and *Vitito v. Hamilton*, 86 Ind. 137, the expressions of dissent, by force of the term, are excluded from the decisions.

In *Carnahan v. Yerkes*, 87 Ind. 62, 67, the following language was used: "An execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a *bona fide* or innocent purchaser." The statement is incomplete, because silent as to notice. Applied to a judgment creditor purchaser with notice of the prior equity, it is right; to one without notice, wrong. The facts in the case disclose that the judgment creditor purchaser had notice, prior to the execution sale, of the senior rights of his adversary. The quotation must be limited,—or regarded as *dictum*.

In *Shirk v. Thomas*, 121 Ind. 147, 153, it was said: "*Rooker v. Rooker*, 75 Ind. 571, *Gifford v. Bennett*, 75 Ind. 528, *Vitito v. Hamilton*, 86 Ind. 137, \* \* \* have, indeed, been overruled and must be regarded as without force. \* \* \* The great weight of authority, evidenced by our own well considered cases, \* \* \* is that a judgment creditor who buys at his own sale obtains only the interest which the judgment debtor had in the property at the time the judgment was entered."

The facts were these: Albert Tyner, on August 1, 1884, owned certain land. That day he deeded it to James Tyner. The deed was recorded in May, 1885. On December 6, 1884, James Tyner, for full value, deeded the land to Shirk's ancestor. This deed was recorded February 18, 1885. Shirk's ancestor went into possession under his deed, and Shirk was in possession at the time of the sale under Thomas's judgment. On October 28, 1884, Thomas caused a writ of

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attachment to issue against Albert Tyner on the ground of his nonresidency. The writ was levied on the land in question. January 8, 1885, Thomas recovered judgment in attachment. July 7, 1886, order of sale was issued. July 31, 1886, sale occurred and Thomas bought. Neither James Tyner nor Shirk's ancestor nor Shirk had any notice of the attachment proceedings. The deed from Albert Tyner had been on record fourteen months, and Shirk and his ancestor had been in possession of the land nineteen months, before Thomas purchased at the execution sale.

When it was determined that the rights of Thomas as holder of a judgment in attachment were no greater than those of the holder of an ordinary judgment, and were therefore subordinate to prior equities, the case was ended. Thomas could not be an innocent purchaser at any sort of a sale that occurred more than a year after he had notice of the prior deeds. The quoted proposition is pure *dictum*.

Nor does one of the seventeen cases cited in *Shirk v. Thomas*, 121 Ind. 147, as supportive of the *dictum* uphold it. In *White v. Wilson*, 6 Blackf. 448, a misdescription in a mortgage was corrected against judgment creditors, not against purchasers at execution sale. In *Glidewell v. Spaugh*, 26 Ind. 319, the right of a purchaser at execution sale was held inferior to the right of one in possession under an unrecorded deed at the time of the sale. Possession was notice. In *Watkins v. Jones*, 28 Ind. 12, the controversy was between a wife who sought to enforce a secret trust against her husband and a judgment creditor of the husband. No question concerning rights under execution sales was involved. Nor did the question arise in *Troost v. Davis*, 31 Ind. 34, wherein the holder of a prior equity sought to enjoin an execution sale. In *Hampson v. Fall*, 64 Ind. 382, Fall sent money to his mother with which to buy land for him. She took title in her own name, and subsequently mortgaged the land to one Vawter, who knew of the trust. Vawter, for value, transferred the mortgage to Hampson, who got a deed through foreclosure.



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Hampson had no notice of Fall's equity. Hampson's title was held to be paramount. There was no sheriff's sale in *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562. The holder of a prior equitable lien enjoined a judgment creditor from proceeding to execution sale on his judgment. In *Jones v. Rhoads*, 74 Ind. 510, it appears that Castor devised his lands to Daniel Rhoads, a stranger. The heirs of Castor brought an action to set aside the will. A compromise was made, under which the court entered judgment that the will was valid, the heirs quitclaimed to Daniel, and Daniel gave his notes secured by mortgage on the devised lands to Jones as trustee of the heirs for the full value of the lands. Jones as trustee later got a deed through foreclosure. Before the notes and mortgage were executed, Patton had recovered against Daniel Rhoads a judgment, on which Jacob Rhoads became replevin bail. After the foreclosure sale, Jacob paid Patton, caused execution to issue, and bought at the sale. Jacob was not a party to the foreclosure proceedings. On Jones's suit to quiet title, Jacob prevailed because the judgment lien attached to the land before the mortgage lien did. In *Sharpe v. Davis*, 76 Ind. 17, an ineffectual effort was made to hold, by virtue of a sheriff's deed, land to which the title never was in the judgment debtor and for which the defendant had a recorded deed before the execution sale occurred. The same *dictum* appears in the opinion, however. Judgment creditors in *Boyd v. Anderson*, 102 Ind. 217, failed to prevent the reformation of a prior deed made by the judgment debtor. In *Heberd v. Wines*, 105 Ind. 237, a wife quieted her equitable title against a judgment creditor of her husband who held the legal title in trust for her. *Blair v. Smith*, 114 Ind. 114, was a case of collusion between husband and wife to defraud the husband's creditors, and the rights of purchasers at execution sale were in no way involved. In *Miller v. Noble*, 86 Ind. 527, Miller, at his own execution sale on judgment against the widow of John Noble, purchased land that the widow took under the statute. She had married again before

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the judgment was rendered. After her death during coverture, the Noble children recovered the land from Miller. The case presents no question of secret equities. *Hays v. Reger*, 102 Ind. 524, concerned solely the subjection of a judgment lien to a prior equity. In *Foltz v. Wert*, 103 Ind. 404, the purchaser at execution sale had constructive notice, and his assignee both constructive and actual notice, of the prior equities. *Wright v. Tichenor*, 104 Ind. 185, decides that a sale upon a judgment against the husband alone does not convey the interest of the wife. The case does not pertain in the least to the relation between purchasers at execution sale and holders of prior secret equities. In *Wright v. Jones*, 105 Ind. 17, creditors of a widower unsuccessfully sought to subject one-third of his deceased wife's land in fee to the liens of their judgments in spite of her will to the contrary made in pursuance of an agreement between the husband and wife. *Taylor v. Duesterberg*, 109 Ind. 165, was a suit by a creditor of a husband to set aside as fraudulent a deed to his wife. No question arose that related to rights under execution sales.

The statement in *Shirk v. Thomas* that the cases of *Rooker v. Rooker*, *Gifford v. Bennett* and *Vitito v. Hamilton* have been overruled is wholly gratuitous. They enunciate principles that are founded in reason; they are not opposed by any decision in this State on the same or similar facts; they flow with the current of modern authority; and they certainly are not overborne by the dissent in the *Rooker* and *Vitito* cases nor by the *obiter dicta* in *Sharpe v. Davis*, *Carnahan v. Yerkes*, and *Shirk v. Thomas*.

Judgment reversed, with instructions to sustain the demurrer to each paragraph of complaint.

Whiteman v. Whiteman.

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[No. 17,787. Filed March 10, 1899.]

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158	262
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**WILLS.—*Latent Ambiguity.—Extrinsic Evidence.***—Where the writer of a will wrote the preamble, "Whereas, I, ———, on the 18th day of October, 1890, made my last will and testament of that date, do hereby declare the following to be a codicil to the same," evidence was properly admitted to show that the writer wrote "18th day of October" instead of — day of February; that the will written on the — day of February was fully, and in all of its material parts, copied into and incorporated in the instrument written October 18th, and that the will referred to in the preamble thereof was destroyed at the request of the testator, and in his presence. *pp. 264-272.*

**SAME.—*Latent Ambiguity.—Extrinsic Evidence.—Codicil.***—Parol evidence is admissible in a suit to contest the validity of a will to show that the preamble thereof purporting to be a codicil to a will of the same date was intended to refer to a will of a previous date which, after writing such preamble, was copied therein, and then destroyed at the request of testator, and in his presence. *pp. 272-274.*

**SAME.—*Evidence.—Executor as Witness.***—The executor of a will is a competent witness in support of the will as to matters accruing during the lifetime of the testator. *p. 274.*

**INSTRUCTIONS.—*When Correct as Applied to One Issue.***—Giving an instruction correct in form and substance as to one of the issues in the cause, not purporting to apply to other issues, and directing the jury to find for the defendant if that issue was determined in his favor, is not reversible error, where the jury was properly instructed as to the other issues in the cause in subsequent instructions given. *pp. 274-276*

**SAME.—*Issues Upon Which There Was no Evidence.***—The court is not required to instruct the jury as to issues upon which there was no evidence. *p. 277.*

**SAME.—*Wills.—Loss of Memory.***—No error was committed in refusing to instruct the jury in the trial of an action to contest a will that a person who has lost his memory is incapable of making a valid will. *pp. 278.*

**SAME.—*Abstract Rules of Law.***—The court is not bound to give instructions which state mere abstract rules of law, without explanation or qualification. *p. 278.*

From the Vigo Circuit Court. *Affirmed.*

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*S. R. Hamill, J. G. McNutt, J. D. Early and A. M. Higgins*, for appellants.

*Geo. W. Kleiser, J. H. Kleiser, J. E. Lamb, J. T. Beasley, S. B. Davis, S. M. Reynolds and Geo. M. Davis*, for appellees.

DOWLING, J.—This is a suit to contest the validity of a will. The grounds of the contest are: (1) That the testator was of unsound mind; (2) that the will was unduly executed; (3) that the instrument is not a will, but a codicil to a will which was revoked; and (4) that the instrument is not a will, but a codicil to a will which has not been admitted to probate in any court.

Issues were formed, and a trial by jury resulted in a verdict in favor of the validity and due execution of the will. A motion for new trial was overruled, appellants excepted, and judgment was rendered ratifying the probate of the will. From this judgment the contestors appeal.

The facts are these: Ellis O. Whiteman was a childless widower, possessed of real and personal property of the probable value of \$17,000, situated in Vigo county, Indiana, where he resided. During the latter part of his life he was afflicted with a painful and incurable disease, which rendered him almost helpless. Some time in February, 1890, he sent for one Murphy, a justice of the peace, with whom he was intimately acquainted, and instructed him to prepare his will. Murphy wrote the instrument, agreeably to the directions given him by Whiteman, and it was executed by the latter in the presence of two witnesses, who subscribed it at his request. This will was delivered by Whiteman to Murphy for safe-keeping. On the 18th of October, 1890, Whiteman again sent for Murphy, and told him he wished to give to Richard M. Doty and Elizabeth Doty each the sum of \$300, and that this should be done by a codicil to his will. Murphy returned to his home to get the will executed in February, 1890, and brought that will to Whiteman. Murphy began

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the preparation of the proposed codicil to this will, and when he had written the words, "Whereas I, Ellis O. Whiteman, on the *18th day of October, 1890*, made my last will and testament of that date, do hereby declare the following to be a codicil to the same," Whiteman interrupted him and said, "Why just copy the other (referring to the will of February, 1890) and put those two clauses in it, and that will be all right." Murphy then proceeded to copy the will of February, 1890, without change, except that the two clauses giving to Richard M. Doty and Elizabeth Doty \$300 each were inserted. By mistake, Murphy had written the words, "*18th day of October, 1890*," instead of "February —, 1890." The instrument, when completed, was signed by Whiteman in the presence of two witnesses, who, at his request, subscribed it in his presence. Whiteman thereupon directed Murphy to take the will of February, 1890, to the stove, and let him see him burn it, and Murphy did so, Whiteman remarking at the time, that he "didn't want to have but one will in existence." He also told Murphy to take the instrument just executed to his home, and keep it. No persons were present when this paper was executed, excepting Whiteman, Murphy, and the subscribing witnesses. Whiteman died December 19, 1890; and after his death no will, or writing purporting to be a will, excepting the instrument so executed by him on the 18th day of October, 1890, was found among his papers, or elsewhere. There was no proof that he made any will on the 18th of October, 1890, except the will in question.

In the 993 pages of testimony contained in the record we find the usual conflict of statement among the witnesses as to the condition of the mind of the testator, but no evidence as to the procurement of the will by the exercise of undue influence by any person. It is urged on behalf of appellants that the court erred in admitting *extrinsic evidence* "to contradict and impeach" the writing executed October 18, 1890, and claimed by appellees to be the last will and testament of Ellis O. Whiteman; that it erred in giving, of its own motion, in-

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struction numbered two, and in refusing to give instruction numbered eighteen asked for by appellants. Several minor questions are discussed in the brief of appellants' counsel, but they will not require further mention.

The entire instrument, which had previously been admitted to probate as the last will of Ellis O. Whiteman, and which is the subject of controversy here (omitting the various devises and legacies) is in these words:

"Whereas I, Ellis O. Whiteman, on the 18th day of October, eighteen hundred and ninety, made my last will and testament of that date, do hereby declare the following to be a codicil to the same: I do hereby give and bequeath," etc. \* \* \*

"I hereby nominate and appoint James F. Murphy, executor of this my last will and testament, hereby authorizing and empowering him to compromise, adjust, release, and discharge, in such manner as he may deem proper, the debts and claims due me. I do also authorize and empower him, if it shall become necessary, in order to pay my debts, to sell by private sale, or in such manner, upon such terms of credit, or otherwise, as he may think proper, all or any part of my real estate, and deeds to purchasers to execute, acknowledge, and deliver in fee simple. I hereby revoke all former wills by me made."

"In testimony hereof, I have hereunto set my hand and seal this 18th day of October in the year 1890."

[Signed] "ELLIS O. WHITEMAN."

"Signed and acknowledged by said Ellis O. Whiteman as his last will and testament in our presence."

"Witnesses:

CARL KRIETENSTEIN,

LEMUEL M. HOPEWELL."

From a very early day, the courts have found it necessary to apply with extreme rigor the rules excluding extrinsic evidence affecting the construction of wills, or the correction of alleged mistakes therein. The opportunities for fraud and the temptations to perjury which would be afforded by a re-

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laxation of these rules forbid any deviation from the spirit and manner in which they have constantly been insisted upon and enforced. We have no inclination to abrogate or disregard any of these wise and indispensable restrictions, and we believe that cases of particular hardship arising from their application are less to be deprecated than the general inconvenience and peril which would ensue upon their lax or irregular enforcement. These rules, however, have always been held subject to certain reasonable exceptions, and it is important in every instance to determine whether the case falls within the rule or within the exception. In *Lord Cheyney's Case*, 5 Coke 68, "Sir Thomas Cheyney, Knt. Lord Warden of the Cinque Ports, 1 Eliz., made his will in writing, and thereby devised to Henry, his son, divers manors, and to the heirs of his body, the remainder to Thomas Cheyney, of Woodley, and to the heirs male of his body, *on condition* 'that he, or they, or any of them shall not alien, discontinue, etc.' And it was a question in the Court of Wards, between Sir Thomas Perot, heir general to the Lord Warden, and divers of the purchasers of Sir Thomas Cheyney, if the said Sir Thomas, should be received to prove by witnesses *that it was the intent and meaning* of the deviser to include his son and heir within these words of the condition (he or they) and not only to restrain Thomas Cheyney, of Woodley, and his heirs males of his body: but Wray and Anderson, Chief Justices, on conference had with other justices resolved, that he should not be received to such averment out of the will, for the will concerning lands, etc., ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience that none should know by the written words of a will, what construction to make, or advice to give, but it should be controlled by collateral averments out of the will: But," it is said, "if a man has two sons, both baptized by the name of John, and conceiving that the elder, (who had been long absent), is dead, devises his land by his

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will in writing to his son John, generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead; or that he at the time of the will made, named his son John, the younger, and the writer left out the addition of the younger."

In *Lord Walpole v. Earl of Cholmondeley*, 7 Durn. & East 134, it is said by Lord Kenyon, (p. 144): "There is no doubt but that parol evidence may be received in many cases to explain doubts in wills; and the rule is correctly described in the maxim of Ld. Bacon, which has been alluded to. Where extrinsic circumstances let in by parol testimony, explaining the situation of the testator's family and of the legatee's, introduce a doubt of the testator's intention, the same kind of evidence that introduced the doubt may be admitted to explain it. On that proceeded the case that I mentioned on a late occasion of *Beaumont v. Fell*, where a legacy was given by the will to *Catharine Earnley*, there being no such person in existence: there was no ambiguity on the face of the will, but the latent ambiguity was introduced by extrinsic evidence, and the same kind of evidence also shewed that there was a person of the name of *Gertrude* whom the testator called *Gatty*, which name the person who drew the will mistook for *Katy*; in that case therefore as parol evidence was admitted to shew the latent ambiguity, parol evidence was also admitted to explain it. It has been argued that the evidence which was rejected by the Court of Common Pleas ought to be received in many cases that might be put: I will not say that it ought not; but this, I think, we may safely lay down as a rule, that in order to make such evidence admissible the party proposing it must put his case into a situation to enable the Court to receive it; he must shew a latent ambiguity, without which the Court cannot receive it. \* \* \* Supposing *Lord Orford* had said to Coney, 'I have two wills in Moone's hands, desire him to send me the last will,' and



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Moone had by mistake sent him the first, and that mistake had been shewn by parol evidence; there would have been a latent ambiguity, and it seems to me, (though the opinion is extrajudicial) that that ambiguity might have been explained by other parol evidence; on the same principle, as in the instance of canceling a will, where parol evidence is admitted to shew *quo animo* the act was done; or as in the case of a child destroying a deed."

In *Mann v. Executors of Mann*, 1 John's, Ch. Rep. 231, it is said by Chancellor Kent: "The question here is, whether, under the bequest of 'all the rest, residue and remainder of the moneys belonging to my estate at the time of my decease,' the widow be entitled to anything more than the cash which the testator left at his death; or whether, as the defendants have contended, she be entitled also to the bonds, mortgages and notes.

"This question has led to another, and that is, whether the parol evidence offered be admissible to explain the testator's meaning.

"It is a well settled rule, that seems not to stand in need of much proof or illustration, for it runs through all the books, from *Cheyney's Case*, (5 Coke 68) down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described; and (2) To rebut a resulting trust. All the cases profess to proceed on one or the other of those grounds. (*Hodgson v. Hodgson*, Prec. in Ch. 229, 2 Vern. 593; *Pendleton v. Grant*, 2 Vern. 517; *Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Beaumont v. Fell*, 2 P. Wms. 140; *Hampshire v. Pierce*, 2 Ves. 216; *Urich v. Litchfield*, 2 Atk. 372; *Lord Walpole v. Earl of Cholmondeley*, 7 Durn. & East 134, 138; *Lord Eldon, in Druce v. Dennison*, 6 Ves. 397.) If there be a mistake in the name of the legatee, or there be two legatees of the same name, or if

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the testator bequeath a particular chattel, and there be two or more of the same description, or if from any other misdescription of the estate, or of the person, there arises a latent ambiguity, it may and must be explained by parol proof, or the will would fall to the ground for uncertainty. When a latent ambiguity is produced, according to the language of the courts (Lord Thurlow, in 1 Ves. Jr. 259, 260, 415, and Lord Kenyon, in 7 T. R. 148), in the only way in which it can be produced, viz., by parol proof, it must be dissolved in the same way; and there is no case for admitting parol evidence to show the intention upon a latent ambiguity; and the objection to supply the imperfection of a written will, by the testimony of witnesses, is founded on the soundest principles of law and policy."

These cases leave no doubt as to the principles upon which courts proceed when called upon to decide whether parol evidence shall be admitted to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator. The general rule is that such evidence cannot be admitted. The exceptions are the two cases specified by Chancellor Kent: (1) Where there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described, and (2) to rebut a resulting trust. It is to be observed that in recent years there has been a general tendency to greater liberality in the admission of parol evidence in respect to ambiguities in wills.

The decisions in this State are in harmony with the cases above cited. *Cleveland v. Spilman*, 25 Ind. 95; *Judy v. Gilbert*, 77 Ind. 96; *Cruse v. Cunningham*, 79 Ind. 402. See also the admirable chapter on Wills, in Browne on Parol Evidence 435.

It is clear that there is an ambiguity in the writing propounded by appellees as the last will of Ellis O. Whiteman, and that such ambiguity is a latent one. It is introduced by the extrinsic evidence showing: (1), that the writer of the

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will by mistake wrote, "Whereas, I, Ellis O. Whiteman, on the 18th day of October, 1890, made my last will and testament of that date," when he should have written, and intended to write, and was understood by the testator to write, "Whereas, I, Ellis O. Whiteman, on the — day of February, 1890, made my last will and testament of that date;" (2), that the will so referred to as having been made October 18, 1890, but which was really made February, — 1890, was fully, and in all its material parts, copied into and incorporated with the so-called codicil; and, (3), that the will referred to in the preamble to the supposed codicil as having been made October 18, 1890, was, at the time of the making of the latter, destroyed at the request of the testator, and in his presence.

If, in the case referred to by Lord Kenyon in *Lord Walpole v. Earl of Cholmondeley*, 7 Durn. & East 134, it was competent to prove that there was no such person in existence as *Catharine Earnley*, but that there was such a person as *Gertrude*, whom the testator called *Gatty*, which name the person who drew the will mistook for *Katy*, then, on the same principle, evidence is admissible here to prove that there was no such will as is described as of the date of *October 18, 1890*, but that there was a will of the date of *February —, 1890*, and that the latter was incorporated in the will in controversy, and was then destroyed.

The second illustration made use of by Lord Kenyon in the same case is even more pointed: "Supposing *Lord Orford* had said to Coney, 'I have two wills in Moone's hands, desire him to send me the *last* will,' and Moone had, by mistake, sent him the *first*, and that mistake had been shewn by parol evidence, there would have been a latent ambiguity, and it seems to me (though the opinion is extrajudicial) that that ambiguity might have been explained by other parol evidence, on the same principle, as in the instance of canceling a will where evidence is admitted to shew *quo animo* the act

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was done; or as in the case of a child destroying a deed." See, also, *Covert v. Sebern*, 73 Iowa 564, 35 N. W. 636.

Again, it is urged that the writing in controversy is not a will, but only a codicil to a will either canceled or not yet proved. This is a charge that the writing under examination is an *imperfect testamentary paper*. But, if this is true, that very circumstance lets in extrinsic evidence to establish its true character, or, as is said by Sir John Nicholl, in *Ustick v. Bawden*, 2 Add. Ecc. 249: "Where an allegation propounds an *imperfect* testamentary paper, it being a clear principle that the legal presumption is adverse to that paper, the allegation must contain facts of a sufficiently stringent nature to encounter, and repel, an adverse legal presumption, in order to insure its own admissibility."

And in the case of *Medlycott v. Assheton*, 2 Add. Ecc. 280, it is said by the same judge: "A codicil is, *prima facie*, dependent on the will; and the cancelation of the will is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of, and unconnected with, the will, that, under circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of *intention*. Consequently the legal presumption in this case may be *repelled*, namely, by showing, that the testatrix intended the codicil to operate, notwithstanding the revocation of the will."

*In re Gordon*, L. R. (1892) Probate 228, (67 L. T. R. 328) a testatrix executed a will in 1887, and a subsequent will in 1889, by which she revoked all previous wills. In 1891 she executed a codicil, which, by mistake, was described as a codicil to the will of 1887. It was held that probate might be granted of the codicil, together with the will of 1889, with the reference to the will of 1887 omitted.

The facts of the present case are, in some respects, similar to those *In re Sarah Dent*, 23 W. R. 417. A testatrix left a will dated June 3, 1868, and three codicils, dated respectively, January 30, 1870, April 30, 1870, and December 9,

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1870, and the codicil of April 30, 1870, referred to "the last will of me, which bears date the 26th day of April, 1870."

Sir James Hannen, after stating the facts, declared that he had come to the conclusion that there never was any such will of the 26th day of April, 1870, but that the reference was to the codicil which was executed on April 30. The instructions were in all probability given on the 26th April; and when they were copied out, a false reference was made as to the date of the will. There were many instances of mistakes in date having been disregarded by the court when no doubt was entertained of the identity of the instrument. He thought that a mistake had been made of putting the 26th of April, 1870, for the 3rd of June, 1868, and therefore granted letters of administration with the will and the three codocils annexed.

Neither this case nor the preceding one, (*In re Gordon*) was contested, but as examples of procedure in such cases they are entitled to some weight.

The testimony of the writer of Whiteman's will removes every doubt as to the reference to the will intended. He was engaged in drawing up the proposed codicil on the 18th day of October, 1890. Whiteman had made a will February —, 1890. He had it before him, and he desired to make a codicil to it. The reference was to this will of February —, 1890, but by the mistake of Murphy, who was writing the intended codicil, the date at which he was so engaged in writing the codicil, viz. October 18, 1890, was inserted. When he had progressed so far, he was instructed by the testator to copy the entire will to which he had at first intended to make only a codicil. This was done, and the will of February —, 1890, was then and there destroyed by the direction of the testator.

There is yet another ground on which we think the testimony admissible. In giving an interpretation to a will, and to discover the intention of the testator, the court always has

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the right to put itself in the place of the party, and then see how the terms of the instrument affect the property or subject-matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument, subject, however, to those limitations which are always observed when this rule is applied. 1 Jarman on Wills 380, note 1; *Daugherty, Adm., v. Rogers*, 119 Ind. 254, 3 L. R. A. 847; *Price v. Price*, 89 Ind. 90.

Another circumstance in this particular instance, which would have much weight if the case were doubtful, is that the uncertainty is only as to matter of inducement or by way of preamble. The will is sufficiently definite both as to the persons intended and the property devised. Its sole defect, if it has a defect, is in a reference to an erroneous date. A direct issue was tendered upon this point by appellants. They alleged in their amended complaint that the writing was not a will, but a codicil to a will which had been revoked, or to a will which had not been admitted to probate. The evidence of the circumstances attending the execution of the will was properly admitted under this issue. That evidence clearly showed that there was no will of October 18, 1890, except the will in question, and that the latter was not a codicil, but a complete will in itself, revoking all other wills, and disposing of the entire estate of the testator.

Objection is also made to the examination of Murphy, the executor, as a witness to support the will. He was a competent witness, and there was no abuse of discretion on the part of the court in calling upon him to testify to matters occurring in the lifetime of the testator.

The court gave to the jury instruction numbered two, as follows: "(2) If you are satisfied from the evidence in this case that Ellis O. Whiteman, on the 18th day of October, 1890, when he made the instrument being contested in this action, had mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein, and to know his next of kin, and their deserts, and had a general

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knowledge of the property and estate of which he was possessed, and understood the business in which he was then engaged, he was not of unsound mind, and was possessed of mind sufficient to make a valid will, and you should find for the defendants; for the law does not undertake to measure a man's intellect, and define the exact quality or extent of mind and memory necessary to capacitate him to make a will, and, although a man's mind may be feeble, it may yet be sound."

The objection taken to this instruction, as stated in the brief of counsel for appellants, is that "it wholly ignores one of the main issues in the case, and flatly instructs the jury to find for the defendants if the testator's mind was sound. Inasmuch as undue execution of the will, and undue influence, exercised upon the testator, was one of the main issues in the case," etc.

The court had previously given an instruction in these words:

"(1) I instruct you that the instrument which is being contested in this suit is testamentary in form, and that though, upon its face, it is declared to be a codicil, yet that, as by its terms and provisions, it makes disposition of property of its maker, Ellis O. Whiteman, it is entitled to be taken and considered as his will, provided you find from the evidence that it was not procured by fraud or undue influence, and that at the time it was made said Ellis O. Whiteman was of sound mind, and that it was signed by him in the presence of two competent persons as witnesses, who, at his request, in his presence, and in the presence of each other, signed it as such witnesses, and that it has not been revoked; and this is true notwithstanding you may find from the evidence that at the time it was written and executed said Ellis O. Whiteman had previously executed a will which was then in existence, and which he, upon the execution of this, revoked by having it destroyed."

In at least ten of the instructions subsequently given to the jury, viz. the second, tenth, twelfth, fourteenth, fif-

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teenth, sixteenth, eighteenth, twentieth, twenty-third, and twenty-fifth, the court directed their attention to the issue of the alleged undue execution of the will, and the effect of the exercise of undue influence in procuring it to be made. These instructions, together with instruction numbered one, fully and plainly informed the jury that there were other questions to be considered by them besides that of the soundness or unsoundness of the mind of the testator, and it is impossible that they should have been misled by anything contained in instruction numbered two. Neither the authorities cited by counsel, nor their reasoning, sustain their objection to this instruction. It is not erroneous in form or substance. Applied to the one issue of the soundness or unsoundness of the mind of the testator, it states the law correctly, and it does not purport to instruct them on any other issue.

The case of *Conway v. Vizzard*, 122 Ind. 266, is very much in point. In that case the following instruction was given and excepted to: "(13) If the deceased, Anthony Gallagher, was of sound mind when the will in issue was made, although afterwards he may have become delirious or of unsound mind, *your verdict should be for the upholding of the will.*" The court say: "It is objected to these instructions that they virtually told the jury to find a verdict for the appellee in the event they found the testator of sound mind at the time of the execution of the will, without regard to the other issues in the cause." As we have said, instructions are not to be construed in detached portions, but must be construed as a whole. In the first instruction given to the jury at the request of the appellant the court said to the jury: "If the testator was of unsound mind at the time the will was executed, the plaintiff would be entitled to have it set aside; or, if said will was unduly executed, the plaintiff would be entitled to have it set aside; or, if it was obtained by undue influence or fraud, the plaintiff would be entitled to have it set aside; or if it was obtained by duress, the plaintiff would be entitled to have it set aside. We do not think the jury were



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authorized to infer from instructions thirteen and fourteen, in view of what was said to them in instruction number one, given at the request of the appellant, that they should find a verdict for the appellee in the event they found the testator sane at the time he executed his will, without regard to the other issues in the case."

The instruction complained of in the present case did not misstate the law, nor was it contradictory of any other instruction given. Nothing more was required of the jury than that they should exercise ordinary intelligence in considering it in connection with the other instructions in the cause.

But upon another ground the objection to this instruction was properly overruled. There was no evidence that the execution of the will was procured by the exercise of undue influence. Out of the immense volume of the testimony counsel have been able to point out only one statement in the evidence—that of Minnie Blockson—in support of this issue. She testified as follows: "Well, it must have been, to the best of my knowledge now, about two years before he died, or a year and a half; and he said to me, 'Stephen was up here, and he said to me that you had told his girls that I had said they were nothing but paupers when they came up here, and would have starved to death if I hadn't moved them here.' I says, 'Uncle, I never said it.' He says, 'If you did say it, you and the girls had better straighten it up, or I will change my will.' I says, 'I can't help that, and I never said it, and I do not intend to straighten it up;' and he said, 'Well, it had better be straightened up,' and we just dropped it at that." This evidence proved nothing. Besides, it was utterly incompetent to establish undue influence. *Hayes v. West*, 37 Ind. 21; *Todd v. Fenton*, 66 Ind. 25; *Vance v. Vance*, 74 Ind. 370.

The court refused to give instructions numbered eighteen, asked for by appellants. It is in these words:

"(18) A person who has lost his memory is incapable of making a valid will; so, if the jury find that before and at

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the time Ellis O. Whiteman made his will he had lost his memory, then you should find for the defendants."

An instruction in that form was well calculated to mislead the jury. While it may be true that a total loss of memory, or the fact that it has become seriously impaired, may render a person incompetent to make a will, it is not every slight or partial loss of memory which creates such disability. A court is not bound to give to a jury instructions which state mere abstract rules of law, without explanation or qualification, when the giving of such instructions is more likely to perplex or confuse than to enlighten and assist them in arriving at correct conclusions. Moreover, the court had properly and sufficiently stated the law on the subject of the legal effect of the loss of memory on testamentary capacity in instructions numbered two, eleven, twenty-one, twenty-four, twenty-eight and four-sevenths, and twenty-nine.

There was no error in modifying instruction number nineteen, nor in the refusal of the court to give the other instruction asked for by appellants, for the reason that the law of the case was fully stated in the other instructions given. Finding no error in the record, the judgment is affirmed.

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STATE, EX REL. MORGAN, v. THE WORKINGMEN'S BUILDING AND LOAN FUND AND SAVINGS ASSOCIATION ET AL.

[No. 18,488. Filed March 10, 1899.]

**APPEAL AND ERROR.—Record.—Demurrer.**—Where the order-book entry showing the filing of the demurrer to an alternative writ of mandate recites that the "defendants jointly and severally demur to said alternative writ," and the language used in the demurrer filed clearly shows that it is a joint and several demurrer of all the defendants, it will be so considered on appeal, though in the demurrer the word "defendant" was used instead of "defendants." *p.* 279.

**TAXATION.—Building and Loan Associations.**—Stock in building and loan associations, whether paid up, prepaid, running, or otherwise, is taxable at its true cash value. *pp.* 279, 280.

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State, *ex rel.*, v. Workingmen's, etc., Assn.

**CONSTITUTIONAL LAW.**—*Exempting Building and Loan Stock from Taxation.*—Any law either directly or indirectly exempting stock in building and loan associations from taxation is unconstitutional. *p. 280.*

**TAXATION.**—*County Assessor May Inspect Books of Building and Loan Associations and Other Corporations.*—*Mandamus.*—For the purpose of listing the property of building and loan associations and other corporations for taxation a county assessor has the right to inspect the books and papers thereof, and may enforce that right by mandate. *p. 280.*

From the Monroe Circuit Court. *Reversed.*

*J. E. Henley and J. B. Wilson*, for appellant.

*H. C. Duncan, I. C. Batman and Loudon & Loudon*, for appellees.

**MONKS, C. J.**—This action was brought by the relator, as county assessor, to compel appellee the said building association, and its co-appellees, the officers of said association, to permit him, as such assessor, to examine the books of said building association for the purpose of determining whether any of the stock of said association had been omitted from taxation. . An alternative writ of mandamus was issued, and a demurrer thereto, for want of facts, was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellees.

The ruling of the court in sustaining said demurrer is assigned as error. It is insisted by appellees that the demurrer sustained was that of a single defendant, and no question is therefore presented by the assignment of errors. The order-book entry showing the filing of the demurrer to the alternative writ recites that the "defendants jointly and severally demur to said alternative writ." The demurrer filed was treated by the court and the parties as the joint and several demurrer of all the defendants. The language used in the demurrer, although the word "defendant" is used instead of "defendants," clearly shows that it is the joint and several demurrer of all the defendants.

It is the settled law in this State that the stock in building

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and loan associations, whether paid up, prepaid, running or otherwise, is taxable at its true cash value. *State, ex rel., v. Real Estate, etc., Assn.*, 151 Ind. 502, 503, and cases cited. Any law therefore either directly or indirectly exempting the same from taxation is in violation of section 1, article 10 of the Constitution, being section 193 Burns 1894, section 193 Horner 1897, and therefore void. *Deniston, Aud., v. Terry*, 141 Ind. 677, 678, 682; *Harn v. Woodard*, 151 Ind. 132; *State, ex rel., v. City of Indianapolis*, 69 Ind. 375, and cases cited; *Warner v. Curran*, 75 Ind. 309. It is also settled law that county assessors, township assessors, county auditors, Auditor of State, board of review, and State Board of Tax Commissioners, for the purpose of listing property for taxation, each have the right to inspect and examine the records of all public offices, and the books and papers of all corporations, and taxpayers in the State, and may enforce such right by writ of mandamus. Section 8444 Burns 1894, section 6302 Horner 1897; *State, ex rel., v. Real Estate, etc., Assn., supra.*

The other objections urged to the complaint are such as could only be reached by a motion to make more definite and specific, as the remedy for uncertainty in pleading is not by demurrer. *Copeland, Aud., v. State, ex rel.*, 126 Ind. 51, 53, and cases cited. Judgment reversed, with instructions to overrule the demurrer to the alternative writ, and for further proceedings not inconsistent with this opinion.

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 HATFIELD ET AL. v. CUMMINGS, RECEIVER.
 

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[No. 18,354. Filed June 10, 1898. Rehearing denied March 14, 1899.]

RECEIVER.—*Authority to Bring Action.—Complaint.*—A complaint in an action by a receiver to foreclose a mortgage, alleging that plaintiff was duly appointed receiver of an association, and at the time was duly empowered, ordered and directed to collect by suit, if necessary, all claims due such association, sufficiently shows that the receiver had authority to sue. pp. 281, 282.

SAME.—*Foreclosure of Mortgage by Receiver.—Complaint.*—Where a

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receiver was appointed to take charge of the property of a corporation because its charter had expired, and such receiver was empowered to collect by suit all debts due the concern, a complaint by the receiver to foreclose a mortgage need not show that there are any debts due making the foreclosure necessary. *p. 282.*

**APPEAL AND ERROR.**—*Joint Assignment.*—A ruling not available as to all the parties complaining of it cannot be successfully assigned as error jointly by them. *pp. 282, 283.*

**CORPORATIONS.**—*Stockholders Bound by the Action of Court in Appointment of Receiver.*—Stockholders of a corporation, who are such pending litigation resulting in the appointment of a receiver therefor, are bound thereby. *pp. 283-285.*

**RECEIVER.**—*Appointment of.*—*Collateral Attack.*—The validity of the appointment of a receiver, when made by a court of competent jurisdiction, is not subject to collateral attack. *pp. 286, 287.*

**SAME.**—*To Wind Up the Affairs of Corporations at Expiration of Charter.*—*Authority.*—Where, under section 3013 Horner 1897, a receiver is appointed to wind up the affairs of a corporation, such receiver, in an action to collect a debt due the corporation, may sue in his own name without specific authority from the court. *pp. 287, 288.*

**SAME.**—*Appointment of Receiver.*—*Validity Of.*—Averments of facts showing that defendants were stockholders in a corporation when plaintiff was appointed receiver thereof, and that the validity of such appointment had been finally adjudicated in an appeal to which the corporation was a party, constitute a sufficient reply to an answer denying the validity of the appointment. *pp. 288, 289.*

From the Wabash Circuit Court. *Affirmed.*

*J. M. Hatfield, J. B. Kenner, U. S. Lesh and J. T. Alexander,* for appellants.

*Slick & Hunter, O. W. Whitelock and S. E. Cook,* for appellee.

**McCABE, J.**—The appellee, as receiver, sued to collect a note, and to foreclose a mortgage given by appellants to said association to secure the payment of said note. The issues made were tried by the court, resulting in a special finding of facts, on which the court stated conclusions of law leading to judgment in favor of the plaintiff.

The assignment of errors calls in question the sufficiency of the complaint, the action of the court in overruling appellants' demurrer thereto; in overruling appellants' motion in

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arrest of judgment; in overruling appellant James M. Hatfield's demurrer to the second paragraph of appellee's reply to the joint answer of said Hatfield and the Huntington City Building, Loan, etc., Company; in overruling the demurrer of Thursy J. Hatfield to the second paragraph of reply to the second paragraph of her separate answer; in its conclusions of law; and in overruling appellants' motion for a new trial.

This is the second time this case has been in this court. *Hatfield v. Cummings, Rec.*, 142 Ind. 350. After the return of the cause to the Huntington Circuit Court, the venue was changed to the Wabash Circuit Court. On the former appeal the judgment was reversed because the complaint failed sufficiently to allege that the receiver had been authorized to sue. The cause was remanded with leave to amend the complaint; and the principal objection to the complaint now is that the amendment did not obviate the defect pointed out on the former appeal. The allegation in the amended complaint as to the authority of the receiver to sue is "that said Luther Cummings was duly appointed and qualified as receiver of said association, and, among other things, was then and there, by said court, duly empowered, ordered, and directed to collect by suit, if necessary, all the claims due said association." This made the complaint sufficient in that respect. *Hatfield v. Cummings, Rec.*, 140 Ind. 547; *Hatfield v. Cummings, Rec.*, 142 Ind. 350.

Another objection to the complaint is that it does not show that the association is in debt, or that any claims have been allowed, or judgments rendered, making the foreclosure of the mortgage for the collection of the note sued on necessary. A number of cases are cited where stockholders of insolvent banking corporations, and the like, were sued by a receiver to collect the stock subscribed, and in some instances beyond the amount of such stock; and in such cases it was held that the receiver's complaint was bad, because it failed to show that the payment of the debts and liabilities of the insolvent concern made it necessary to force such collections. But this

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is a very different sort of a case. The receiver here was appointed under the statute because of the expiration of the charter of the corporation, and not because it was insolvent. It is rather a flimsy and unconscionable excuse for the maker of a note and mortgage for borrowed money to give,—why it should not be paid,—that the lender does not need it to pay debts with. There was no error in holding the complaint good.

Both James M. Hatfield and Thursy J. Hatfield are appellants, and have joined in the assignment of error on the separate demurrer of said James M. and the separate demurrer of Thursy J. to certain replies. Neither of these appellants were interested in, or injured by, the ruling on each other's separate demurrers to such replies. It is well established that a ruling not available as to all parties complaining of it, cannot be successfully assigned as error jointly by them. *Earhart v. Farmers Creamery*, 148 Ind. 79, and cases there cited. Therefore, we need not further notice the sufficiency of said replies.

It is next objected that the finding of facts does not show an order of court authorizing the receiver to sue. The special finding upon this point states that "the court then and there, upon said hearing, appointed Luther Cummings, the plaintiff herein, as such receiver of and for said Lime City Building, Loan and Savings Association, and empowered, ordered, and directed said receiver to take charge of its books, papers, and property, and to collect all claims due to said association by suit or otherwise." Under the authority of the cases cited above, the finding of the receiver's authority is sufficient.

The conclusion of law objected to by appellant is the first, which is as follows: "That the defendants Hatfield, being members and stockholders in the said Lime City Building, Loan and Savings Association at the time the order appointing the plaintiff receiver of said association was entered, and at the time of rendering final judgment in said action so commenced and prosecuted by said Harvey C. Black, are bound

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*Hatfield v. Cummings, Rec.*

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thereby as if they had each been, and continued until its final determination to be, parties defendant in that suit." This conclusion of law has reference to the facts found under the issues upon the answer of appellants assailing the validity of the appointment of appellee as receiver in the suit of Black against the Lime City Building, etc., Association, and appellee's replies to said answer. All the facts are found about that litigation, in which it is shown that the same objections are urged to the validity of the appointment in this case that were put in issue and adjudicated in that case, adjudging that the appointment so made was valid, and upheld by the judgment of the court. And that judgment was affirmed on appeal to this court in *Lime City, etc., Assn. v. Black*, 136 Ind. 544.

It is true, the finding shows that, though the Hatfields were parties to that cause, yet they were dropped out of the case by a dismissal as to them before the final judgment. But the finding shows that they were at all times, during that litigation and adjudication resulting in the appointment of a receiver for such association, both stockholders in said association and members thereof.

An eminent author says: "For instance, a stockholder in a corporation against which a judgment has been recovered, and out of whose estate the execution issued thereon has been satisfied, is so far a privy in law that he may bring error to reverse it, but for that very reason he cannot attack the judgment collaterally for any defect such as an irregularity in the service of process." 1 Black on Judg., section 260; Freeman on Judg., (2nd ed.) section 177. So it has been held by this court in two cases that: "Whether the action of the court in appointing a receiver was according to law, we need not decide. If the appointment was erroneous, it was not void, and cannot, in a collateral proceeding, be assailed, even by the parties thereto, and certainly not by strangers in the attitude of appellant." *Pressley v. Lamb*, 105 Ind. 171, 190; *Cook v. Citizens Nat. Bank*, 73 Ind. 256.

Kerr on Rec., page 166, says: "It is immaterial that the



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order appointing a receiver may have been improper or erroneous. It is not competent for any one to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it be a subsisting order." This authority is cited and quoted with approval in both of the cases first above cited, and in *Smith v. Harris*, 135 Ind. 621. So it results from the foregoing that the Hatfields, even if they were strangers to the adjudication appointing the receiver, cannot attack the same collaterally; and also, being in privity with the association, by their membership therein and their relation thereto as stockholders therein, they are equally bound by that judgment. *Whittlesey v. Frantz*, 74 N. Y. 456; *Bangs v. Duckenfield*, 18 N. Y. 592; 2 Black on Judg., section 583.

The substance of appellants' contention that the circuit court erred in overruling their motion for a new trial is that the evidence shows clearly that their answers in confession and avoidance were proved without any conflict in the evidence. The substance of those answers is that the receiver ought not to be allowed to foreclose the mortgage for the collection of the note secured thereby, because the application for his appointment as such was not made until the 23rd day of July, 1890, and that the time in which the statute allowed such a receiver to be appointed expired on May 5, 1890,—previous to such appointment. The evidence and record show that the suit by Black against the association, in which the appellee was appointed as receiver, was commenced on April 12, 1890, which was before the expiration of the three years allowed by the statute for closing up the affairs of the association after the expiration of the chartered life thereof. As was held by us on appeal from the judgment in that case, the appointment might be validly made under the provisions of the statute, after the expiration of the three years, if the application therefor was made before the expiration of such three years. In that appeal it was attempted to be shown that the application was not made until after the ex-

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piration of such three years in this way, namely: By showing that the complaint in that case contained no application for the appointment of a receiver when filed, and up until July 23, 1890, which was after the expiration of such three years, such application was brought into that complaint by amendment. Whether that required such application to be deemed made and filed at that date, or at the date of the filing of the complaint, was sought to be presented to us in that appeal. But the date of bringing into the complaint the application was not shown in the record in that case. Hence, the complaint containing the application for the appointment of a receiver appearing to have been filed in time, we affirmed the judgment. In that case and in that appeal was the time, and that was the place, to question the legality, the regularity, and the validity of the appointment of the appellee here as receiver; and the court having jurisdiction of the subject-matter and parties, all objectors must forever after hold their peace. All objections to such appointment after the affirmance of that judgment, in the nature of a collateral attack come from whomsoever, or from whatever quarter they might, are collateral impeachments of the judgment of a court of competent jurisdiction. And such attacks, we have seen, cannot be successfully made, even though the court, in making such appointment, erred and misconstrued the law. In case no appeal had been taken, the effect of the judgment appointing the receiver is the same.

It may be conceded that the appellants proved their answers as to the allegation that the amendment to the complaint in the Black case, made July 23, 1890, brought into the complaint in that case for the first time the application for a receiver. That was proved by oral evidence. But the judgment of appointment was in evidence, which was affirmed in this court in *Lime City, etc., Assn. v. Black*, 136 Ind. 544. That judgment was conclusive as to the appointment of the receiver and it was competent evidence regard-

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less of the replies. The truth is, the circuit court ought to have sustained, instead of overruling, appellee's demurrers to such answers. Those answers admitted appellee's appointment as receiver, but sought to avoid it by setting forth facts by which it is claimed that the inference arises that the appointment was erroneous. That was nothing more nor less than a collateral attack upon a judgment of a court of competent jurisdiction, which the law forbids, as already said. The answers being insufficient the ruling upon the replies was wholly immaterial and could not and did not harm appellants even if erroneous.

This conclusion is not in harmony with what was decided as to the sufficiency of the third paragraph of the answer in *Hatfield v. Cummings, Rec.*, 140 Ind. 547. In that case, however, the question as to the right to collaterally attack the judgment of appointment of a receiver was not suggested by counsel, or noticed by the court. That case, as to that point, is modified to conform to this opinion.

Judgment affirmed.

ON PETITION FOR REHEARING.

**PER CURIAM.**—Appellants complain that we did not pass upon the question presented by them, namely, the insufficiency of the complaint, and the facts to support the judgment, in this: that it is not averred in the complaint, nor found as a fact in the special finding, that appellee was authorized by the court to sue in his own name.

We regard the averment and finding contended for as altogether immaterial. In an action like this it is not necessary that the complaint shall disclose any specific authority from the court for the receiver to sue in his own name. It must be borne in mind that appellee is a receiver appointed, upon the application of a creditor, to wind up the affairs of a corporation, upon the expiration of its charter. In such case, he may sue in the name of the corporation or otherwise,—that

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is, in his own name, as he may elect. Section 3435 Burns 1894, section 3012 Horner 1897. What was said by the court in this case on its former appeal, touching this question (*Hatfield v. Cummings, Rec.*, 142 Ind. 350), was a correct statement of the law, except when otherwise provided by statute. *Manlove, Rec., v. Burger*, 38 Ind. 211. The statute which controls the right of a receiver, appointed to wind up the affairs of a corporation whose charter has expired, was neither presented nor considered by the court in that case; hence, what is there said is not applicable to the question relative to the authority of a receiver appointed under section 3435, *supra*, to sue in his own name.

Appellants further and vigorously complain that we did not pass upon the sufficiency of the second paragraphs of replies to the second paragraphs of the separate answers of appellants. Appellants' joint assignment of error, to the overruling of the demurrers to these replies, appears complete on one page of the record, and upon another page, under a repeated title, appear proper separate assignments of error to the same action of the court, and it is manifest that the judge who wrote the opinion overlooked the separate assignments.\* The answers to which the replies were addressed are, in substance, the same, and, in effect, allege that the Lime City Building, Loan and Savings Association was legally incorporated on the 5th day of May, 1879, for a period of eight years; that it ceased to exist as a corporation on the 5th day of May, 1887; that the three years allowed by law, in which to wind up its affairs, expired May 5, 1890; that no receiver was appointed nor applied for by any creditor, stockholder, or member of said association or other person prior to the 23d day of July, 1890.

The replies assailed are, in substance, the same, and, in effect, allege that appellants, James M. and Thursy Hatfield, were each stockholders in said Lime City Building, Loan and Savings Association on the 12th day of April, 1890, and the

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said Thursy, a debtor of said association for the sum of money sued for in this action, and that upon said last named day one Black, himself being a stockholder in said association and a creditor thereof, commenced his suit in the Huntington Circuit Court for the collection of his debt and the appointment of a receiver to wind up the affairs of said association; that such issues were formed in said action between the plaintiff, Black, and such association, that called in question, among other things, the right and power of the court to appoint a receiver in said cause; that said issues were submitted to the court for trial, and, after hearing the evidence, the court found that the plaintiff was entitled to recover, and that a receiver ought to be appointed, and did thereupon render judgment for the plaintiff for the sum of \$958.50, and did appoint appellee receiver of said association, and did thereupon order said receiver to collect all assets due said association, by suit or otherwise, and from the same to pay the plaintiff's judgment; that appellee duly qualified and entered upon the discharge of his duties as such receiver; from which judgment and order, appointing appellee receiver, said association appealed to the Supreme Court, and, among other things, assigned as error in said Supreme Court the action of said Huntington Circuit Court in the appointment of appellee as receiver; that said appeal has been determined by said Supreme Court and the decision of the said Huntington Circuit Court in all things affirmed and reported in *Lime City, etc., Assn. v. Black*, 136 Ind. 544.

The pleadings in the Black case are set out in the replies. These replies to answers, that only questioned the authority of the court to appoint a receiver, are clearly good. They show that appellants were stockholders of the association—that is, a part of the association—at the time of the adjudication, and are bound by it. See authorities cited in the opinion, *supra*. Furthermore, what is said in the main opinion touching the conclusion of law, drawn from the facts found

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under these answers and replies as being a collateral attack, is a further and complete answer to appellants' contention.

We have carefully reviewed the record and find no error in it. The petition for rehearing is overruled.

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**KELLEY, GUARDIAN, ET AL. v. SHIMER, ADMINISTRATOR.**

[No. 18,726. Filed March 14, 1899.]

**DEED.—Recital Reserving Life Estate.—Construction.**—A conveyance in the ordinary form, except a recital that the "deed is to take effect and be in full force on and after the death of this grantor," is a deed, and is not testamentary in character. The only effect of the recital being to reserve a life estate to the grantor, and thus postpone the possession of the grantee until after the death of the grantor.

From the Marion Circuit Court. *Affirmed.*

*Masson & Reagan*, for appellants.

*Ayres & Jones*, for appellee.

**MONKS, C. J.**—Appellee, as the administrator of the estate of Eliza J. Clements, deceased, filed his petition against appellants, and obtained an order to sell certain real estate to make assets for the payment of claims allowed against said estate.

It appears from the record that in May, 1886, Eliza Cossell executed to her daughter Eliza Jane Clements an instrument in writing which was in the ordinary form of a warranty deed, except that after the regular granting words and the description of the land, it read as follows: "This deed is to take effect and be in full force on and after the death of this grantor, Eliza Cossell. This deed, grant, and conveyance is made to the grantee, to have and to hold the same during her natural life; and after the death of the grantee, Eliza Jane Clements, then the above described real estate shall be the absolute property of the heirs of the body of Eliza Jane Clements grantee herein." Said written instrument was in the year 1886 recorded in the deed records of

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Marion county, Indiana. Said Eliza Jane Clements died intestate in the year 1894, leaving as her only heirs appellants Minter Clements, her husband, and Anna J. Clements and Bessie M. Clements her children. Afterwards, in 1897, said Eliza Cossell died intestate, leaving as her only heirs said Anna J. Clements and Bessie M. Clements. Appellants insist that, "while the instrument in question is in form a deed, it is in fact an attempted testamentary disposition of the grantor's land, and not being executed with the requisites of a will, passed no title to Eliza Jane Clements, appellees intestate, but said real estate, on the death of Eliza Cossell was inherited by said Anna J. and Bessie M. Clements, her grandchildren." It is conceded by appellants, however, that if said instrument is a deed, the land described therein is a part of the estate of Eliza Jane Clements, and that the court correctly ordered the sale of said land on the petition of appellee.

The rule is that "an instrument having all the formalities of a deed will be construed to operate as a deed, wherever it appears therefrom that it was the intent of the maker to convey any interest whatever to vest upon the execution of the paper. If, however, it appears that all the estate which it was the purpose to convey was reserved to the grantor during his life, and that the deed was only to take effect upon the death of the grantor, it will be construed to be testamentary in its character." *Spencer v. Robbins*, 106 Ind. 580, 584; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Leaver v. Gauss*, 62 Iowa 314, 19 Cent. L. J. 46. The instrument in question embodies all the requisites of a statutory deed, as provided by section 3346 Burns 1894, section 2927 Horner 1897, and clearly vested in the grantee an estate in fee simple, unless the recitals following the description of the real estate have a contrary effect. The general rule laid down by the authorities is that a declaration that the deed shall not go into effect until the death of the grantor does not give it a testamentary character. Jones' Law of Real Prop. in Con-

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veyancing, section 527, and cases cited in notes. The cases decided by this court hold that recitals in deeds substantially the same as those in this case did not render such instruments testamentary in character, but that they conveyed an estate in fee simple when the instruments were executed, and that the only effect of such recitals was to reserve a life estate to the grantor, and thus postpone the possession of the grantee until after the death of the grantor. *Cates v. Cates*, 135 Ind. 272, 275, 276; *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. 213, and note, pages 219-221; *Owen v. Williams*, 114 Ind. 179; *Spencer v. Robbins*, *supra*. The same rule is declared in the following cases: *White, Adm., v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Seals v. Pierce*, 83 Ga. 787, 10 S. E. 589, 20 Am. St. 344; *Johnson v. Hines*, 31 Ga. 720; *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Shackelton v. Sebree*, 86 Ill. 616; *Wall v. Wall*, *supra*; *Wyman v. Brown*, 50 Me. 139; *Abbott v. Holway*, 72 Me. 298; *Chancellor v. Windham*, 1 Rich. (S. C.) 161, 42 Am. Dec. 411; *Phillips v. Lumber Co.*, 94 Ky. 445, 22 S. W. 652, 42 Am. St. 367, and note, p. 370; *Reynolds v. Towell* (Ky.), 11 S. W. 202; 2 Devlin on Deeds, section 855b; *Jones Real Prop.*, sections 526, 527.

In *Owen v. Williams*, 114 Ind. 179, the language of the deed was that the grantors of the deed, naming them, "convey and warrant to" the grantee, naming him, "after my decease, and not before, the following real estate," describing it. The court said, at page 188: "The use of the phrase therein, 'after my decease, and not before', did not make the deed testamentary in character, but operated merely to show that the grantee's use and enjoyment of the lands conveyed would not begin, under such deed, until after the grantor's death, and not before. *Spencer v. Robbins*, 106 Ind. 580."

In *Cates v. Cates*, 135 Ind. 272, the deed contained this provision: "The grantor hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds, thereof, unto himself during his natural life."



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In *Wilson v. Carrico*, 140 Ind. 533, the deed contained a provision "to be of none effect until after the death of the grantors, then to be in full force."

In *White v. Hopkins*, 80 Ga. 154, the deed contained this provision: "The title to the above described tract of land to still remain in said grantor for and during his lifetime, and at his death to immediately vest in the said " grantee.

In *Seals v. Pierce*, 83 Ga. 787, the provision was: "This deed is to go into effect after the death of said Nancy Cope- lan of the first part she claiming her right to hold the land so long as she lives and at her death then at her death all the franchises and right which she hold to be to the party of second part to be by her willed or conveyed as the party of the second part may elect."

In *Johnson v. Hines*, 31 Ga. 720, the grant was, "To have and to hold after my death the aforesaid property."

In *Bunch v. Nicks*, 50 Ark. 367, the provision was that "the deed shall go into full force and effect at my death."

In *Shackelton v. Seabee*, 86 Ill. 616, the provision was: "This deed not to take effect until after my decease; not to be recorded until after my decease."

In *Wall v. Wall*, 30 Miss. 91, the provision was: "The deed to take effect as far as regards the *handing over* of the prop- erty *at my death*; and I reserve the right *to revoke it* at any time during my life, by filing in the clerk's office a written revocation under my hand and seal; and I do hereby make known and declare, that the signing, sealing and delivery of this deed, and *placing the same amongst my papers*, is in- tended by me as a *delivery of said property at my death*, and *to take effect at that time*."

In *Wyman v. Brown*, 50 Me. 139, the provision was: "This deed or conveyance not to take effect during my life- time, and to take effect and be in force from and after my decease."

In *Abbott v. Holway*, 72 Me. 298, the deed contained a

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provision that "this deed is not to take effect and operate as a conveyance until my decease."

In *Chancellor v. Windham*, 1 Rich. 161, the grantor gave, granted, and released to the grantee certain real estate "at my death to have and hold," etc.

In *Phillips v. Lumber Co.*, 94 Ky. 445, the deed recited that, "this deed is not to take effect" until the grantor's death, "he to have and keep possession of said farm during his life."

In *Reynolds v. Towell* (Ky.), 11 S. W. 202, it was provided in the deed that "this deed is not to take effect until after the death of myself and the death of my wife, Cynthia, and at her death this deed shall be in effect."

It is clear from an examination of the cases of *Spencer v. Robbins*, 106 Ind. 580, *Owen v. Williams*, 114 Ind. 179, *Cates v. Cates*, 135 Ind. 272, and *Wilson v. Carrico*, 140 Ind. 533, decided by this court, which are fully supported by cases decided by courts of last resort in other jurisdictions, above cited, that the provision that the "deed is to take effect and be in full force on and after the death of the grantor," only postponed the grantees right to possession until after the death of the grantor. It follows that the instrument in controversy was a deed. The judgment is therefore affirmed.

## ROBARDS v. THE STATE.

[No. 18,189. Filed March 15, 1899.]

APPEAL AND ERROR.—*Bill of Exceptions in Criminal Prosecution.*—

Under section 1847 R. S. 1881, requiring all bills of exceptions in a criminal prosecution to be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days, if a bill of exceptions is not presented within the term at which the trial was had, the record must affirmatively show that time beyond the close of the term was granted.

From the Fountain Circuit Court. *Affirmed.*

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*F. M. Howard, L. Nebeker, D. W. Simms, T. N. Rice and J. T. Johnston*, for appellant.

*W. A. Ketcham*, Attorney-General, and *Howard Maxwell*, for State.

JORDAN, J.—Appellant was charged by indictment, in the Parke Circuit Court, with having committed the crime of murder in the first degree. The venue was changed to the Fountain Circuit Court, and on a trial by jury, in the latter court, at the November term, 1896, thereof, he was convicted of voluntary manslaughter, and his punishment fixed by the jury at imprisonment in the state's prison for a period of twenty-one years, and, over his motion for a new trial, judgment was rendered accordingly. From this judgment he appeals, and the only error assigned is that the trial court erred in overruling his motion for a new trial. In addition to the argument of the Attorney-General, relative to the merits of this appeal, that official also insists that no question is presented for the determination of this court upon the merits of the case; for the reason that the several bills of exceptions, by which appellant seeks to expose the alleged errors of the lower court, were each presented to the trial judge for his approval, and were signed and filed after the close of the term at which the judgment was rendered, without leave being first obtained from the court granting to appellant the right to present and file such bills beyond the close of said term, and therefore it is contended that neither of said bills is properly in the record.

Under the facts, as they are disclosed to us by the transcript, we are compelled to concur in this contention of the Attorney-General. Among other proceedings, the record discloses the following: On the twenty-eighth judicial day of the November term, 1896, of the Fountain Circuit Court, appellant filed his motion for a new trial, which motion, on the thirtieth judicial day of that term, was overruled, and on the same day, and as a part of the same entry, it appears that the

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court rendered judgment against appellant upon the verdict of the jury.

It is not shown by the record that, at any time after the return of the verdict, but before or concurrent with the rendition of the final judgment, the court granted appellant time beyond the close of the November term, 1896, in which to tender and file bills of exceptions. Notwithstanding this fact, however, three bills of exceptions—the first purporting to embrace the evidence given in the cause, with the rulings, exceptions, and objections incident thereto; the second containing the instructions given and refused, with the exceptions thereon; and the third exhibiting the rulings of the court in respect to the competency of certain jurors—are each shown to have been presented to the trial judge during the first week of the February term, 1897, of the Fountain Circuit Court; and at that time signed by the judge, and filed by counsel for appellant. Section 1847 R. S. 1881, section 1916 Burns 1894, section 1847 Horner 1897, being section 272 of our criminal code, provides as follows: "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk. The exceptions must be taken at the time of the trial."

It is well settled that, under the requirements of this section, all bills of exceptions in a criminal case must be made out, presented to the trial judge for his signature, and filed during the term at which the final judgment is rendered. If not tendered and filed until after the close of such term, then leave to tender and file beyond such term must be first obtained, and in such case, on appeal to this court, it must affirmatively appear from the record that time, beyond the close of the term at which the final judgment was rendered, was granted by the lower court in which to prepare and present such bills to the trial judge; otherwise, they will not be

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regarded as constituting a part of the record. If such leave is given by the trial court, it can only be shown by an entry in the order-book. A recital in the bill itself that leave was granted will not suffice. *Calvert v. State*, 91 Ind. 473; *Hunter v. State*, 101 Ind. 406; *Hunter v. State*, 102 Ind. 428; *Barnaby v. State*, 106 Ind. 539; *Fehn v. State*, 3 Ind. App. 568; *City of Indianapolis v. Kollman*, 79 Ind. 504; *Benson v. Baldwin*, 108 Ind. 106; Elliott on App. Proc., section 801. The record in this appeal not disclosing that time, extending beyond the term at which the final judgment in this case was rendered, was granted by the court to appellant in which to tender and file bills of exceptions, it is evident that the bills in question cannot be regarded as a part of the record in this appeal, and, as the questions sought to be presented depend thereon, they cannot be considered. The judgment is therefore affirmed.

THE CONSOLIDATED STONE COMPANY ET AL. v. SUMMIT.

[No. 18,331. Filed March 16, 1899.]

**PLEADING.—Complaint.—Personal Injuries.—Knowledge of Danger.**

—An allegation in a complaint in an action by an employe for personal injuries sustained by reason of defective appliances that he did not know of such defect or danger, not only repels actual knowledge, but any implied knowledge thereof. pp. 299, 300.

**APPEAL AND ERROR.—Motion for Judgment on Answers to Interrogatories.**

—The Supreme Court cannot look to the evidence in considering an alleged error of the trial court in overruling a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, but only to the pleadings, the verdict, and the answers to the interrogatories. p. 300.

**VERDICT.—Answers to Interrogatories.**

—The general verdict determines all issues in favor of the party recovering same, and the verdict will stand as against a motion for judgment on answers to interrogatories unless the answers are in irreconcilable conflict therewith. p. 300.

**MASTER AND SERVANT.—Personal Injuries.—Knowledge of Danger.—**

**Assumption of Risk.**—The mere fact that a servant may know or could have known of a defect by the exercise of ordinary care does not necessarily charge him with an assumption of the risk growing out of such defect, because the risks and hazards on account there-

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161	684
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of may not be so open and apparent as to be appreciated by him on account of his ignorance or want of experience. p. 302.

**VERDICT.**—*Answers to Interrogatories.*—*Presumptions.*—The Supreme Court will indulge all reasonable presumptions in favor of a general verdict as against a motion for judgment on answers to interrogatories. pp. 302, 303.

**APPEAL AND ERROR.**—*Evidence.*—*When Not All in Record.*—*Maps and Plats.*—Where, in the trial of a cause, maps or plats were referred to by the witnesses by way of explanation of questions asked them, for the purpose of showing the positions of certain persons and things and their movements, and such maps are not made a part of the record, the Supreme Court will not consider any questions in such appeal depending on the evidence. pp. 303, 304.

**SAME.**—*Instructions.*—*Joint Assignment.*—*New Trial.*—An assignment as cause for a new trial that the court erred in giving of its own motion a certain instruction, and in refusing to give certain instructions requested by appellant, must fail, where the assignment was joint, and the appellant's brief contained no argument as to error in refusing to give instructions asked. p. 304.

From the Monroe Circuit Court. *Affirmed.*

*Duncan & Batman, Moses F. Dunn and S. B. Lowe, for appellants.*

*John R. East and Robert G. Miller, for appellee.*

**MONKS, C. J.**—Appellee brought this action to recover for personal injuries received by him on account of the alleged negligence of appellants while working in their stone quarry.

Appellants' demurrer to the amended complaint for want of facts was overruled. The jury returned a general verdict in favor of appellee, and also answered interrogatories propounded by appellants. Over appellants' motion for a judgment in their favor upon the answers to the interrogatories notwithstanding the general verdict, and their motion for a new trial, the court rendered judgment in favor of appellee. These rulings of the court are severally assigned as error.

It is alleged in the amended complaint, among other things, in substance, that appellee was a derrick hand, and that a large stone, thirty-five feet long, four feet thick and four and one-half feet wide, weighing many tons, was being turned over by means of a derrick, when it broke in two

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pieces, at a dry seam running diagonally through the same from top to bottom, and that when it so separated the end of one of the pieces turned up, and struck the west T rail of the track upon which the channeler was moved, and pushed it against appellee's ankle and crushed it; that said dry seam ran entirely through said stone, commencing at the top, extending in a northerly direction, so that, when the same separated, the south end would lift, and raise the broken piece of stone, and tilt it up so as to bring it in contact with such T rail, which fact was known to each of said appellants at and prior to the time of plaintiff's injuries, but was wholly unknown to plaintiff; that the said track so extending over such space was so far above the upper surface of said stone, to wit, two feet and over, that he was unable to imagine any way or manner in which said stone could tilt up and strike the west T rail of the track over which he was attempting to step at the time of his said injury; that said dry seam rendered said stone defective, dangerous, and unsafe, and that said seam was so small that it was not discoverable without a close inspection, and was invisible and hidden from the view of appellee, and at the time of his said injuries he had no knowledge whatever that said stone contained said dry seam, that it was in any way defective, or that there was any danger of the same turning over and injuring him; that appellants knew that said stone was so defective, contained said dry seam, and was dangerous and unsafe for appellee and the other employes to work near and about it, long before appellee received his injuries, but negligently and carelessly caused the same to be turned over in its defective condition, and negligently and carelessly failed to notify or warn appellee of the condition of said stone, and its defects, or the danger of working near it; that said injuries were received by appellee while in the line of his duty as an employe of appellants, and without any fault whatever on his part, but solely on account of the negligence of appellants.

While an employe assumes the risk from obvious defects

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or dangers, open to ordinary careful observation, or such as would be known by the exercise of ordinary care (*Peerless Stone Co. v. Wray*, 143 Ind. 574, 577), yet it is only necessary to allege that he did not know of such defect or danger; and such allegation not only repels actual knowledge, but any implied knowledge. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156, 160, 161. To sustain such allegation, however, the evidence must show that the employe not only had no knowledge of the defect, but could not have known the same by the exercise of ordinary care. We think this complaint was sufficient to withstand the demurrer for want of facts. *Peerless Stone Co. v. Wray*, 143 Ind. 574.

It is next insisted that the court erred in overruling appellants' motion for a judgment in their favor, on the answers to the interrogatories, notwithstanding the general verdict. In discussing this alleged error the appellants call attention to the evidence of appellee, and claim that it shows an assumption of the risk. In determining this question, we cannot look to the evidence, but only to the complaint, answer, and general verdict, and the answers of the jury to the interrogatories.

The general verdict necessarily determines all material issues in favor of appellee, and, unless the answers of the jury to the interrogatories are in irreconcilable conflict with the general verdict, the court did not err in overruling appellants' motion for a judgment in their favor. If such irreconcilable conflict exists, then the court erred in overruling said motion. *Ohio, etc., R. Co. v. Trobridge*, 126 Ind. 391, 393, 394, and cases cited; *Town of Poseyville v. Lewis*, 126 Ind. 80, and cases cited; *Rogers v. Leyden*, 127 Ind. 50, 59, and cases cited; *Graham v. Payne*, 122 Ind. 403, 408, 409; *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 218, 223.

The jury found, in answer to the interrogatories, that there was a seam in the stone where it separated; that said seam was part mud and part dry; that appellee had no knowledge that there was a seam in said stone before it separated and



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caused his injury; that before his injury, appellee had no knowledge of the danger from said seam which caused his injury; that appellee could have seen the seam in said stone twenty feet away if he had looked; that appellee, in climbing out of the ledge, and walking over the T rail that struck his foot, adopted the only convenient and safe course to avoid danger; that the stone which struck the T rail was eighteen inches below the T rail before the stone was moved; that appellee did not know at the time of, and just before, his injury that the moving of the stone was liable to cause the T rail to move in the manner and in the direction in which it did move when it caused his injury, and in a manner calculated to injure one standing in the place where he was standing at the time of his injury; that there were not other convenient places near by, besides the place where appellee was situated at the time of his injury, where he could have remained with safety, and performed his duty as well as at the place where he was, which places he could have reached and occupied in safety in time to have performed all his duties in moving said stone, and thus have avoided injury; that appellee did not know of the existence of the seam in said stone in time to have avoided the accident, or in time to have avoided his injury; that appellee did not know of the peril of his situation in time to have removed to a place of safety, or in time to have avoided injury; that appellee at the time of his injury was acquainted with the fact that there were dry seams and mud seams in the quarry where he was injured, and with the character and description of them.

The answers to the interrogatories cannot be aided by any presumptions, for the rule is that all reasonable presumptions will be indulged in favor of the general verdict, and none will be indulged in favor of the answers to the interrogatories. *Town of Poseyville v. Lewis*, 126 Ind. 80; *Ohio, etc., R. Co. v. Trobridge*, 126 Ind. 391, 394. The special findings override the general verdict only when both cannot stand; the conflict being such, upon the face of the record, as to be

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beyond the possibility of being removed by any evidence admissible under the issues in the cause. *Amidon v. Gaff*, 24 Ind. 128; *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 223. Under the rule stated, it is clear that the facts found in answer to the special interrogatories are not in irreconcilable conflict with the general verdict.

It is found that appellee could have seen the seam in the stone twenty feet away if he had looked; but was this after his injury, or before? We cannot indulge the presumption that it was before, or that it was at any time that would bring such answer in conflict with the general verdict. The answers do not show that appellee was at any time before his injury in a position to see the seam in said stone, or that by the exercise of ordinary care he could have seen it. Moreover, if the answers to the interrogatories showed that before his injury he saw the seam in said stone, or that by the exercise of ordinary care he could have seen it, such fact, if found, would not, as against the general verdict, charge appellee with the assumption of the risks growing out of such defect. This is true because the general verdict finds that appellee did not know, and could not have known by the exercise of ordinary care, the risks to which said seam exposed him, and that he did not assume the risks and hazards on account thereof. There is nothing in the answers to the interrogatories showing that appellee had any experience in handling such stone with a derrick, or how long he had been employed in the capacity of a derrick hand, or that in any way contradicts the general verdict, which, in effect, finds the contrary. The mere fact that a servant may know or could have known of a defect by the exercise of ordinary care does not necessarily charge him with an assumption of the risks growing out of such defect, because the risks and hazards on account thereof may not be so open and apparent as to be appreciated by him, on account of his ignorance or want of experience. *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551, 5 Am. St. 832; *McDonald v. Chicago, etc.*,

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*R. Co.*, 41 Minn. 439, 43 N. W. 380, 16 Am. St. 711; 1 Bailey's Per. Inj., sections 852, 857. We are required, therefore, if necessary to sustain the general verdict, to indulge the presumption that appellee was ignorant and inexperienced in the work in which he was engaged when injured, and of the risks and hazards thereof, and that said risks and hazards were not so open and apparent as to be known or appreciated by him in the exercise of ordinary care, or any other reasonable presumption, which does not conflict with the answers to the interrogatories, that will sustain the general verdict. It is manifest, therefore, that the court did not err in overruling the motion for a judgment in favor of appellants on the facts found in answer to the interrogatories.

It is next insisted by appellants that the verdict is not sustained by sufficient evidence, and is contrary to law. Appellee, in response to this contention, urges that the bill of exceptions affirmatively shows that it does not contain all the evidence given; that in appellee's testimony alone the words "indicating" and "illustrating" are used seventy-five times, and in the testimony of other witnesses ninety times, as to positions of persons and things at the quarry, all of which was understood by the jury as a part of the answer of the witnesses, when they pointed out upon the map, plat, or other representation of the quarry the location and movements of its different persons, and the location of the derrick, and other things testified about. We find that this contention of appellee is substantially correct, and that many facts of vital importance in the determination of this case were in evidence by the use of maps or plats, and considered by the jury, which facts are in no way shown in the bill of exceptions. No map or plat, or other representation of the quarry, is contained in the bill of exceptions; and if it was, there is nothing in the testimony of the witnesses showing where thereon the persons, places, or things "indicated" by the witnesses were located. We cannot, therefore, consider any question presented by said causes for a new trial, because their determi-

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nation depends upon the evidence. *Thorne v. Abattoir Co.*, *post*, 317, and cases cited; *Noerr, Adm., v. Schmidt*, 151 Ind. 579.

It is assigned as a cause for a new trial that the court erred in giving of its own motion instruction five, and in refusing to give each of certain instructions asked by appellants. No argument is contained in the brief showing that the court erred in refusing to give any of the instructions asked, and said cause for a new trial must fail, because it was joint as to each instruction asked, and said instruction five given by the court. *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642, 663-664, and cases cited.

Finding no available error in the record, the judgment is affirmed.

## ROBINSON v. THE STATE.

[No. 18,719. Filed March 16, 1899.]

**APPEAL AND ERROR.**—*Bill of Exceptions.*—The certificate of the judge that the bill of exceptions was presented to him on a certain date for signature, will control a journal entry recited in the record that the bill was presented on a later date. *pp. 305, 306.*

**SAME.**—*Bill of Exceptions.*—Where the bill of exceptions was presented to the court within the time allowed it is properly in the record, although it was not finally approved nor filed until after the prescribed time. *p. 306.*

**WORDS AND PHRASES.**—*Appeal and Error.*—The word "protest" is not equivalent to the word "except" as used in reserving an exception to a ruling of the court, and "earnestly protesting" against a ruling presents no question on such ruling for review. *pp. 306, 307.*

**INSTRUCTIONS.**—*Irrelevant Instructions.*—*Criminal Law.*—Giving instructions irrelevant to the issues and evidence constitutes reversible error, where such instructions tend to injure the complaining party. *pp. 307, 308.*

**SAME.**—*Irrelevant Instructions.*—*Criminal Law.*—Giving an instruction defining self-defense in a prosecution for an assault and battery with intent to commit manslaughter does not amount to reversible error, although the evidence showed that defendant was at no time assaulted nor menaced by any threat, sign or gesture, nor at any time in a situation to apprehend bodily harm. *pp. 308, 309.*

**SAME.**—*Irrelevant Instructions.*—*Criminal Law.*—Error cannot be predicated by defendant on the giving of an instruction defining

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malice and stating some elements of proof thereof as related to murder, where defendant was convicted of assault and battery with intent to commit manslaughter. *p. 309.*

INSTRUCTIONS.—*Assault and Battery.*—*Criminal Law.*—An instruction to the effect that if the jury believed, beyond a reasonable doubt, that defendant committed the assault and battery charged in the indictment, and that at the time he did so he was in a sudden heat of passion, produced by the prosecuting witnesses, or either of them, in the employment of personal violence upon him, and being in such heat, before sufficient time had elapsed for the heat to cool, he, by said assault and battery, without malice, purposed and designed to kill, then the defendant should be found guilty of assault and battery with intent to commit voluntary manslaughter, is not bad for obscurity, nor by reason of its failure to qualify the degree of violence defendant must suffer before he became entitled to the principle of self-defense. *pp. 309, 310.*

From the Tipton Circuit Court. *Affirmed.*

*J. M. Fippen, J. M. Purvis, Dan Waugh, J. P. Kemp and J. N. Waugh*, for appellant.

*William L. Taylor*, Attorney-General, *Merrill Moores, J. W. Fesler and E. E. Stevenson*, for State.

HADLEY, J.—Appellant was convicted of an assault and battery with intent to commit voluntary manslaughter. He has assigned in this court as errors: (1) The overruling of his motion to quash the indictment; and, (2) the overruling of his motion for a new trial; but the only questions presented in his brief arise under the motion for a new trial.

Appellee contends that the bill of exceptions is not properly in the record. It appears that the motion for a new trial was overruled, and exception taken on the 24th day of March, 1898, and sixty days given appellant in which to file his bill of exceptions. On the 9th day of May, 1898, appellant filed in the office of the clerk the longhand manuscript of the shorthand report of all the evidence introduced in the cause. The next journal entry recites "that on the 16th day of July, 1898, in vacation \* \* \* the defendant filed in the clerk's office his bill of exceptions herein, tendered to and

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signed by the Honorable Walter W. Mount, sole judge of said court, on the 15th day of July, 1898, which bill of exceptions embraces the original longhand manuscript of the shorthand report of the evidence filed in the clerk's office of said court on the 9th day of May, 1898, which bill of exceptions reads," etc. Then follows the bill of exceptions, at the close of which is a certificate of the presiding judge to the effect "that on the 24th day of March, 1898, the court overruled defendant's motion for a new trial, to which ruling the defendant at the time excepted; and the court gave the defendant sixty days in which to prepare and file this, his bill of exceptions, and the defendant now here tenders and presents to the judge this, his bill of exceptions, for his signature, this 12th day of May, 1898, which is within the time given by the court. [Signed] Walter W. Mount, Judge Tipton C. C." After the general certificate is the following: "Examined and approved by the court, and ordered made part of the record this the 15th day of July, 1898. Walter W. Mount, Judge Tipton C. C."

The recital in the order-book that the bill of exceptions "was tendered to, and signed by the judge on the 15th day of July, 1898," goes for naught when it comes in conflict with the certificate of the presiding judge, in which it is stated, as facts, identified and authenticated by his signature, that the bill was "tendered and presented" to him for his signature on the 12th day of May, 1898, and finally approved by him, and ordered made part of the record on the 15th day of July, 1898. *Indiana, etc., R. Co. v. Adams*, 112 Ind. 302. It appears affirmatively from the record that the bill was prepared and presented to the presiding judge in due season, and it is therefore effective, although not finally approved nor filed until after the expiration of the prescribed time. Section 1918 Burns 1894, section 1849 Horner 1897; *Vincennes Water Co. v. White*, 124 Ind. 376; *Terre Haute, etc., R. Co. v. Bissell*, 108 Ind. 113. The bill of exceptions is properly in the record.

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Upon the trial, the court limited the argument to thirty-five minutes on a side, and afterward extended it to forty minutes; and the appellant contends that this was an unreasonable allotment of time, and impaired his constitutional right to have his case fully presented to the jury. The record, however, shows appellant to be in the position of having taken no exception to this action of the court. It appears that when the court refused, upon request, to grant further time, the defendant "earnestly protested"; but it is nowhere shown that he at any time excepted or attempted to reserve an exception. "Protest" and "exception" are not equivalent terms in law. "Protested," in the sense conveyed by the record, means an expression of dissent to the act of the court, on the ground of impropriety or illegality, and nothing more. In law, "exception" has a technical signification. It implies that the exceptant reserves the right to present an adverse ruling to a court, having cognizance of error, for review. Its office is to put the decision objected to of record for the information of an appellate tribunal. It will not do to say that the term "earnestly protested" conveyed any such meaning.

It is urged by appellant that the court erred in instructing the jury in the law of self-defense when there was no question of self-defense involved in the case. The bill of exceptions shows that the defendant at no time, in stating his defense to the jury, or in the introduction of his evidence, or in the argument to the jury, made any claim that he acted in self-defense, but placed his defense solely upon the ground and theory that he did not commit the assault and battery charged in the indictment. The bill also shows that the instructions upon the subject of self-defense were given upon the request of the State, and over the objection of the defendant. The evidence adduced shows that the defendant was, at no time, assaulted by either of the prosecuting witnesses, nor menaced by any threat, sign, or gesture, nor, at any time, in a situation to apprehend bodily harm from either of the prosecuting witnesses. It is a well established rule that instruc-

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tions to a jury should be pertinent to the issues and to the evidence. *Reed v. State*, 141 Ind. 116, 122, and authorities cited. And it constitutes reversible error if inapplicable instructions tend to injure the complaining party. *Stockton v. Stockton*, 73 Ind. 510. When, however, it is apparent that irrelevant instructions do not injure the complaining party, the error in giving them is not effective to work a reversal of the judgment. *Elliott's Gen. Prac.*, section 899, and authorities cited.

The evidence shows that there were nine young men engaged in a quarrel on the highway after night, three on one side, and six on the other, and that, at most, but four of them became engaged in a fight,—appellant, Robinson, and Carver, on one side, and Cochran and McNew, on the other. Cochran and McNew were both cut a number of times with a knife. The evidence is conflicting as to whether Robinson inflicted all or any of the injuries upon the prosecuting witnesses, and he testified—and there was some other testimony to the same effect—that he did not strike either of the prosecuting witnesses, with or without a knife; but the evidence was of a character to fully warrant the jury in finding that he perpetrated some, if not all, of the injuries suffered by Cochran and McNew. The matter of self-defense presupposes the commission of the acts charged, and its consideration by the jury, therefore, is secondary, and postponed until the facts charged in the indictment have been first established. It is then considered, to determine whether there was legal justification for the acts committed. In this case there was a fight in which both the prosecuting witnesses were cut with a knife, one seriously. It is not probable that they cut themselves, nor that they cut each other. Neither appellant nor his friend Carver was cut. And it was the province of the jury to determine, from the evidence, if the appellant inflicted the injuries. This the jury did, and, having found that he committed the acts charged, it is not apparent how he could be injured by advice to the jury that they might prop-



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erly consider whether the facts proved would not constitute a legal excuse. The character of the case is such that the jury were necessarily required first to determine whether the appellant struck the wounding blows; and, under appellant's contention, if it is found that he did not strike the blows, then he should be found not guilty, and there the inquiry should end; and, if it is found that he did strike them, then he should be found guilty, if the other essential facts of the indictment are established, and there the inquiry should end. Because the court suggested to the jury an additional chance for acquittal could not possibly injure appellant. It follows, therefore, that the instructions touching self-defense, on the facts in this case, though erroneous, were harmless to defendant, and not a sufficient cause for a reversal of the judgment.

The tenth instruction, given by the court, is complained of. In this, the court defined express and implied malice, and stated some elements of proof of both, as related to the crime of murder. The definitions and methods of proof stated have the unqualified sanction of the law. Besides, it affirmatively appears that appellant was unharmed, even if the instruction had been erroneous, for the reason that he was convicted of an assault and battery, with intent to commit voluntary manslaughter,—a lesser grade of crime, in which malice does not enter as an element. *Rains v. State, ante*, 69.

The fourteenth instruction given by the court is also called in question. In substance, it informed the jury that if they believed, beyond a reasonable doubt, that the defendant unlawfully committed the assault and battery charged in the indictment, and at the time he did so he was in a sudden heat of passion, produced by a provocation given by Cochran and McNew, or either of them, in the employment of personal violence upon him, and, being in such heat, before sufficient time had elapsed for the heat to cool, he, by said assault and battery, without malice, purposed and designed to kill, then the defendant should be found guilty of assault and battery,

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with intent to commit voluntary manslaughter. Appellant's charge that this instruction is obscure, and calculated to confuse and mislead the jury, is without force; and his further contention that it is erroneous, for failure to qualify the degree of violence appellant must suffer before he became entitled to the principle of self-defense, is equally untenable. We find no valid objection to this instruction.

Objections are also urged to the court's instructions, numbers seventeen, eighteen, and nineteen. These cover the doctrine of self-defense,—that whoever invokes it must be himself without fault; the principle of retreating to the wall; that it is allowed the citizen as a shield, and not as a sword; and throughout they correctly state the law.

There are many other reasons assigned for a new trial, but not presented by appellant in his brief. We find no available error in the record. Judgment affirmed.

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 BRUNSON ET AL. v. HENRY ET AL.

[No. 18,078. Filed March 16, 1898.]

**APPEAL AND ERROR.—*Law of Case.***—All questions presented by the record and decided by the Supreme Court become the law of the case from that time forward, whether such questions arise each time in the same manner or not. *p. 312.*

**SPECIAL FINDING.—*Mortgages.—Foreclosure.***—In an action to foreclose a mortgage a copy of the mortgage is not only evidentiary, but an inferential fact, and is properly set out in the special findings. *p. 313.*

**SAME.—*Absence of Finding of Fact.***—Where the wife of defendant in an action to foreclose a mortgage assigns on appeal error of the court in overruling her motion for judgment in her favor on the ground that she did not sign the mortgage, and the special finding does not state that she was the wife of the defendant at the time of the execution of the mortgage, such fact must be taken as found against her. *p. 314.*

**SAME.—*Mortgages.—Foreclosure.***—Where, by the terms of a mortgage the notes secured thereby were made payable to mortgagee's children and grandchildren, it was not necessary in an action to foreclose such mortgage, after the death of mortgagee, for the court to make any findings as to the debts of mortgagee. *p. 315.*

153	313
152	478
152	310
167	558

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**DECEDENTS' ESTATES.—Action to Foreclose Mortgage.—Administration on Estate.**—In an action to foreclose a mortgage made payable to mortgagee's children and grandchildren it was not necessary to prove that the estates of such children as were deceased had been settled, where the complaint alleged that the children died intestate, leaving no debts, and that no administrator had been appointed on account of their estates. p. 315.

**SPECIAL FINDING.—Finding Outside the Issue May be Disregarded.**—Defendant is not entitled to a new trial in an action to foreclose a mortgage because the court went outside the issues and directed the sale of additional lands not covered by the mortgage, but such erroneous finding should be disregarded, and judgment entered on the finding within the issues. pp. 315-317.

From the Marion Superior Court. *Affirmed in part, reversed in part.*

William V. Rooker, for appellants.

W. P. Adkinson and W. Patterson, for appellees.

**MONKS, C. J.**—This action was brought by appellees against appellants to foreclose a mortgage. The mortgage was executed by appellant, Asher C. Brunson, to Mary Ann Threlkeld, who was the mother of mortgagor, to secure the unpaid purchase money for the real estate described in said mortgage, which money, so secured, was, by the terms of said mortgage, to be paid to the children and grandchildren of the mortgagee named in said mortgage; and also to secure said mortgagee the possession and enjoyment, and free use and control, of said real estate during her life.

This is the second appeal of said cause. On the former appeal the case was reversed, with instructions to sustain the demurrer to the complaint. See *Brunson v. Henry*, 140 Ind. 455, where the complaint and the nature of the controversy are fully set forth. On the return of said cause to the court below the demurrer was sustained to the complaint as directed by this court and appellees filed an amended complaint containing the allegations which this court had held were necessary to render the same sufficient. The separate demurrer of said appellant Brunson was overruled to said amended complaint. Said appellant Brunson then filed an

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answer in seven paragraphs. Appellees' demurrer for want of facts was sustained to the second, third, fifth, sixth, and seventh paragraphs of said answer. Julia A. Brunson, the wife of said appellant Brunson, the mortgagor, who did not join in the execution of said mortgage, also filed an answer. Appellees filed a reply to the answers of Brunson and his wife, and, at the request of said appellants, the court made a special finding of the facts, and stated its conclusions of law thereon, and over separate motions by said appellants, Brunson and wife, for judgment in their favor, and their several motions for a new trial, rendered judgment in favor of the appellees.

The questions raised by the demurrer to the amended complaint, and by the demurrer to the second, third, fifth, sixth, and seventh paragraphs of the separate answer of appellant Asher C. Brunson, were determined against said appellants on the former appeal, and the doctrine there declared is the law of this case, binding alike upon the parties and courts through all stages of the cause thereafter. *Board, etc., v. Bonebrake*, 146 Ind. 311, and cases cited. It is insisted, however, by said appellants, that this rule does not apply, because, when the court held the complaint insufficient on the former appeal, the appeal was decided, and if the court went beyond that, and decided any other questions, the same were *obiter dicta*. The rule is that all questions presented by the record, decided by a court of last resort on appeal, become the law of the case from that time forward, binding upon all the courts and parties, whether the question arises each time in the same manner or not. *Board, etc., v. Bonebrake, supra*.

Some of the paragraphs of said answer are drawn upon the theory that said appellant can contradict and change, by parol evidence, the terms of the mortgage as to the consideration for which it was executed. On the former appeal, this court, on page 462, held that this could not be done, except upon a plea of *non est factum*, or an answer alleging a mistake in the mortgage in this respect, with a prayer for refor-

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mation. The paragraphs of answer referred to contained no such plea or answer, and are clearly bad, under the law of this case as decided on the former appeal.

It is next insisted that the court erred in overruling appellant Asher C. Brunson's motion for a judgment in his favor on the special finding. It is stated, among other things, in the special finding, that the mortgage mentioned and set out in the complaint was executed by Asher C. Brunson to Mary Ann Threlkeld, which mortgage is copied into said finding, and that said mortgage was executed to secure the payment of the purchase money for the real estate described in said mortgage.

The court stated seven conclusions of law, to each of which Brunson and wife separately excepted. It is first urged that the part of the finding setting forth a copy of the mortgage sued upon is purely evidentiary, and not the finding of an inferential fact, and should be disregarded. It is true that said mortgage was an evidentiary fact, but it was more than evidence; it was also the inferential fact. *Rowley v. Sanns*, 141 Ind. 179, 187; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 550; *Lake Shore, etc., R. Co. v. Peterson*, 144 Ind. 214, 220, 221. In *Rowley v. Sanns, supra*, this court on page 187 said: "The provisions of the will inserted in the special finding were evidence it is true, but they were also more than evidence, they were the ultimate and highest facts or inferential facts upon the issues they tended to prove." The construction to be placed upon said mortgage was not to be stated in the finding of facts, but in the conclusions of law. There may be cases where it is not necessary to set forth in the finding of facts a copy of the mortgage or other contract which is the foundation of the action or defense, but in this case it was proper to do so.

Objections are also urged to the facts found in regard to the children of Jane Henry, and the settlement of the estates of the deceased children, and it is claimed that they are not sufficient to entitle them to a judgment and foreclosure of

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said mortgage. We are not required to determine this question, because the same is not presented by any assignment of error, or otherwise.

It is next urged that the motion for judgment in favor of the appellant should have been sustained because there was no finding as to the debts of Mary Ann Threlkeld. It was not necessary for appellees to prove, or for the court to make, any finding as to the debts of Mary Ann Threlkeld, the mortgagee.

Appellant Julia A. Brunson, wife of Asher C. Brunson, the mortgagor, insists that the court erred in overruling her motion for a judgment in her favor on the special finding. Since this appeal was filed, a *nunc pro tunc* entry has been made in the court below, over the objections of appellees, showing that said appellant filed a separate answer to the amended complaint, in which she alleged that, "prior to the execution of the mortgage described in the complaint, she was, and ever since has been, and now is, the wife of her co-defendant, Asher C. Brunson; that she did not join in the execution of said mortgage; and that the mortgage was not executed to secure the payment of the purchase money. Wherefore she prays judgment that the court protect her interest." This paragraph of answer is substantially the same as one by the same appellant held insufficient on the former appeal. This is not material, however, as the special finding was against said appellant as to the matter therein alleged. It is found in the special finding that said mortgage was given for the purchase money, and the special finding does not state that she was the wife of her codefendant, Asher C. Brunson, at the time said mortgage was executed. Under the well settled rule, this fact must be taken as found against said appellant. *Archibald v. Long*, 144 Ind. 451, 454, and authorities cited: Moreover, as the mortgage was given for the purchase money of the real estate covered thereby, Mrs. Brunson had no interest therein as against the mortgagee, even if she was the wife of her co-appellant when he executed

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the mortgage. Section 2656 Burns 1894, section 2495 Horner 1897; *Baker v. McCune*, 82 Ind. 339; *Bowman v. Mitchell*, 97 Ind. 155, 157; *Butler v. Thornburgh, Adm.*, 141 Ind. 152, 155; *Butler v. Thornburgh*, 131 Ind. 237.

Appellant Asher C. Brunson filed a motion for a new trial, which was overruled. The action of the court in overruling said motion is assigned as error by said appellant. During the trial appellees offered in evidence the mortgage sued upon, and said appellant objected to the same being read in evidence without it being first shown by the evidence that the estate of the Henry children, alleged in the amended complaint to be deceased, had been settled. The court overruled the objection, and the mortgage was read in evidence. This action of the court is assigned by said appellant as a cause for a new trial. The amended complaint alleged that the Henry children, alleged to be dead, severally died intestate, leaving no debts, and that no administrator had been appointed on account of their said estates. Under such an allegation, it was not necessary to prove that the estates of said children had been settled. The court did not err, therefore, in overruling said objection.

Appellees called as a witness one F. A. Fisher, who had been administrator of the estate of Charlotta Whitesell, which estate had been settled and said administrator discharged, and proved by him that the interest of said Charlotta Whitesell in said mortgage was unknown to him as such administrator, and that the same was not taken into account in any way in the settlement of her estate. On cross-examination appellant asked him as to any inquiries he had made concerning the indebtedness of Asher C. Brunson to said estate, and appellees objected to such question, which objection was sustained by the court. If the interest of said estate in said mortgage was not taken into account, or administered upon, in the settlement of said estate, it was not material whether the administrator made any inquiry concerning the same or not. The making of such inquiries, or the failure to

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make them, could not affect in any way the rights of the parties to said mortgage.

Mary Ann Threlkeld conveyed to appellant Asher C. Brunson "all her right, title, and interest of whatsoever description in and to", describing the real estate. Afterwards, to secure the purchase money therefor, said appellant Brunson executed a mortgage to Mary Ann Threlkeld on the "right, title and interest of Mary Ann Threlkeld in said real estate so conveyed to him by her." The court found that Mrs. Threlkeld owned the real estate described in the deed to said Brunson, in fee simple, and the decree entered upon the finding ordered the same sold to pay the judgment for the indebtedness secured by the mortgage. There was no evidence given that Mrs. Threlkeld owned all the real estate described in the deed to Brunson in fee simple. On the contrary, there was evidence tending to show that said real estate was owned by the first husband of Mrs. Threlkeld, who died in 1859, and left as his heirs at law his widow and children, who inherited said real estate. Asher C. Brunson was one of the children, and appellees were either children or grandchildren of said Brunson, who died the owner of the real estate. Asher C. Brunson purchased of several of the other children their interests in said real estate, and the interest of the widow, who afterwards married one Threlkeld, was an undivided one-third, or about thirty-five acres if partition was made. The mortgage only covered the interest in said real estate described in the mortgage owned by Mrs. Threlkeld at the time that she executed the deed to her son, the appellant Asher C. Brunson, while the decree ordered the entire tract described in the mortgage to be sold, and this seems to include not only the interest in said real estate conveyed to him by his mother, but also the interest in said real estate inherited by Asher C. Brunson from his father, as well as what he purchased from his brothers and sisters. It does not follow, however, that appellants are entitled to a new trial for this reason, because the finding that Mrs. Threlkeld owned all of



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ssid real estate was without the issues. Said finding, therefore, must be disregarded. Disregarding said finding, appellees, under the facts found, are entitled to a decree of foreclosure directing the sale of the interest in said real estate covered by said mortgage. It follows, then, that the personal judgment against appellant Asher C. Brunson was correct, and the sixth conclusion of law and decree of foreclosure were erroneous.

The personal judgment against Asher C. Brunson is affirmed and the decree of foreclosure is reversed, with instructions to restate the sixth conclusion of law, and render judgment foreclosing said mortgage, in accordance with this opinion.

THORNE v. INDIANAPOLIS ABATTOIR COMPANY ET AL.

[No. 16,454. Filed Dec. 18, 1898. Rehearing denied March 16, 1899.]

APPEAL AND ERROR.—*Bill of Exceptions.—Evidence.—New Trial.*—

Where the bill of exceptions affirmatively shows that all the evidence given is not set forth therein, the Supreme Court cannot consider causes assigned for a new trial requiring a consideration of all of the evidence, although the bill of exceptions recites at the proper place "and this was all the evidence given in this cause."

From the Marion Superior Court. *Affirmed.*

*George W. Galvin and William A. Reading, for appellant.*  
*W. H. H. Miller and J. B. Elam, for appellees.*

MONKS, C. J.—Appellant brought this action against appellees, and, at the conclusion of the evidence, the court instructed the jury to return a verdict in favor of appellees, the defendants in the court below. Appellant's motion for a new trial was overruled, and judgment rendered in favor of appellees. The errors assigned call in question the action of the court in overruling the motion for a new trial. The causes assigned for a new trial were "(1) that the verdict of the jury is not sustained by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) the court erred in giving

158	817
159	304
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instruction number one, being the one instructing the jury to find for the defendants; (4) the court erred in refusing to give instructions one, two, and three, requested by plaintiff."

Appellees insist that all the evidence is not in the record, and that, in its absence, neither cause for a new trial presents any question. The proper determination of said causes for a new trial requires a consideration of all the evidence given in the cause. The bill of exceptions, while it contains at the proper place the following, "And this was all the evidence given in this cause," affirmatively shows that all the evidence given is not set forth therein. Such being the case, we cannot consider the causes assigned for a new trial. *Noerr, Adm., v. Schmidt*, 151 Ind. 579; *Weaver v. Kennedy*, 142 Ind. 440, and cases cited; *Stout v. Turner*, 102 Ind. 418, 420; *Jennings v. Durham*, 101 Ind. 391; *Collins v. Collins*, 100 Ind. 266; *Louisville, etc., R. Co. v. Grantham*, 104 Ind. 353, 357, and cases cited. The judgment is therefore affirmed.

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JONES v. THE STATE.

[No. 18,868. Filed March 17, 1899.]

THE STATE  
vs. JONES

**CRIMINAL LAW.—Trial.—Presence of Accused.**—The filing by defendant of a motion for change of venue and for leave to summon witnesses to appear and testify in support thereof and the proceedings of the court on such motions are neither parts of the trial, nor incidents of it, within the meaning of the provisions of section 1855 Burns 1894, that no person prosecuted for an offense punishable by death, or confinement in the state prison or county jail shall be tried unless present during the trial. *p. 320.*

**SAME.—Change of Venue.—Separate Trial.**—The separate motion of one jointly indicted with another for a change of venue involves and includes a motion for a separate trial. *p. 320.*

**SAME.—Separate Trial.—Affidavit of One Jointly Indicted.—Appeal and Error.**—The affidavit of a person jointly indicted with appellant, but separately tried, is not competent evidence on appeal to show that such person did not demand a separate trial. The record is the proper evidence of the proceedings of the court. *p. 320.*

**VENUE.—Change Of.—Discretion of Court.—Appeal and Error.**—Under the statute, section 1840 Burns 1894, it is discretionary with the court to grant or deny a motion for change of venue, and an

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order of court refusing a change of venue will not be disturbed on appeal where there is no abuse of discretion shown. *pp. 320, 321.*  
**CRIMINAL LAW.**—*Jury.*—*Misconduct.*—*Separation.*—*New Trial.*—No error was committed in overruling a motion for a new trial based upon the alleged misconduct of the jury in separating after they retired from the court room, without leave, where it is shown that the separation was unavoidable; that they were not out of the custody and sight of the bailiff, and that not a word was spoken to them by any person. *p. 321.*

From the Ohio Circuit Court. *Affirmed.*

*J. B. Coles*, for appellant.

*William L. Taylor*, Attorney-General, *Merrill Moores* and *H. R. McMullen*, for State.

**DOWLING, J.**—The appellant was jointly indicted with one John Jones for assault and battery with intent to rob. An application for a change of venue on account of local excitement and prejudice against him was made by appellant. In connection with this motion, appellant asked the court to "cause witnesses cognizant of said facts," (referring to the alleged excitement and prejudice) "to be summoned into court to state their knowledge of said facts under oath." The names of the supposed witnesses were not given, nor was it shown where they could be found. Counter-affidavits were filed on behalf of the State, and the motion for the change of venue was overruled. The case against his codefendant, having been disposed of, the appellant was separately tried, and was found guilty. Motion for a new trial overruled, and judgment on verdict.

The reasons presented for a new trial were (1) that the court, in the absence of appellant, who was confined in jail, received and acted upon his motion for an order to summon witnesses in aid of his application for a change of venue; (2) that the court, in the absence of appellant, received and acted upon his motion for a change of venue; (3) that the court directed that appellant's codefendant, John Jones, be tried separately; (4) that the court required appellant to be separately tried; (5) that the court permitted improper state-

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ments to be made to the jury by the prosecuting attorney and his deputy during the argument; (6) that the court overruled appellant's motion to be tried jointly with his codefendant, John Jones, or that he be discharged from custody; (7) that the court refused to change the venue of the cause on appellant's motion; and (8) that, after the jury had retired from the court room, they separated without leave, and went into a coal shed in the rear of the court-house, the deputy prosecutor being there at the same time.

The statute declares that no person prosecuted for an offense, punishable by death, or by confinement in the state prison, or county jail, shall be *tried*, unless personally present *during the trial*. Section 1855 Burns 1894, section 1786 Horner 1897.

But the filing of motions for leave to summon witnesses, and for a change of venue, and the proceedings of the court on these motions, are neither parts of the *trial*, nor incidents of it. Such proceedings are merely preliminary to the trial. Nor is it denied that appellant was present by counsel when these proceedings took place. *Epps v. State*, 102 Ind. 539; *People v. Ormsby*, 48 Mich. 494, 12 N. W. 671; *Reed v. State*, 147 Ind. 41; *Lillard v. State*, 151 Ind. 322.

The separate motion of the appellant for a change of venue involved and included a motion for a separate trial. *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211; *Brown v. State*, 18 Ohio St. 496.

Besides, John Jones, the codefendant of appellant, who was tried first, may have demanded a separate trial, which he had a right to do, and which would have worked a severance, whether appellant desired a separate trial or not. It is true that John Jones denies this in an affidavit; but the record in his case was not produced, nor was any copy of the record included in the bill of exceptions, and such record is the only competent evidence of the proceedings of the court. Defendants jointly indicted have the right to demand *separate* trials, but neither the common law nor the statute gives the



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**HIGHWAYS.—Free Gravel Roads.—Additional Assessment.**—The original order of the board of county commissioners in a proceeding for the construction of a free gravel road is not a final determination of the question of benefits accruing to adjacent landowners, and does not preclude the board from making a second assessment to meet a deficit in the cost of such improvement. *p. 324.*

**SAME.—Free Gravel Roads.—Additional Assessment.—Statute of Limitations.**—Where the original assessment of benefits to adjacent lands was not sufficient to meet the entire cost of the improvement, and proceedings were instituted by the board of county commissioners for an additional assessment of such lands, the six-years statute of limitations has no application. *p. 325.*

**SAME.—Free Gravel Roads.—Additional Assessment to Reimburse County.**—An additional assessment to meet the cost of constructing a free gravel road cannot be defeated by the fact that the cost of the improvement had been fully paid by the county, and that the purpose of the assessment was to reimburse the county. *p. 325.*

**APPEAL AND ERROR.—Evidence not in Record.—New Trial.—Review.**—Where the reasons assigned in a motion for a new trial depend upon the evidence, and the evidence is not in the record, the ruling of the court will not be reviewed on appeal. *p. 325.*

**SAME.—Special Finding.—Joint Assignment of Error.**—Where an exception is made jointly to two or more conclusions of law, the exception must fail if any one of the conclusions is correct. *p. 326.*

From the Huntington Circuit Court. *Affirmed.*

*B. M. Cobb*, for appellants.

*O. W. Whitelock* and *S. E. Cook*, for appellee.

**JORDAN, J.**—This was a proceeding by the board of commissioners of the county of Huntington to re-assess lands benefited by the construction of a free gravel road, known as "The Huntington and Zanesville Highway."

Proceedings to improve this road were instituted in 1881, under the act of 1877, sections 5091, 5092 R. S. 1881, sections 6855, 6856 Burns 1894, sections 5091, 5092 Horner 1897. It appears that the original assessment upon the lands benefited amounted to \$9,000; and the board of commissioners, under the authority of the above statute, in order to raise money to meet the expenses of the improvement, issued and sold bonds to that amount. After collecting the

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original assessment, and applying the money arising therefrom to the payment of these bonds and the interest thereon, it appears that said assessment proved to be inadequate to pay all of the expense incurred in the improvement of the highway. Appellants, upon notice, appeared before the board of commissioners, and remonstrated against the levying of an additional tax, and such proceedings were had before the board that viewers were appointed, and an additional assessment was made, and approved and confirmed by the board, from which order an appeal was taken to the circuit court. In the latter court appellants filed an amended remonstrance. By the first paragraph of their amended remonstrance they challenged the right of the board to make a re-assessment upon their lands to pay the deficit arising out of the construction of the road, and under the third paragraph they set up that the deficit, for the payment of which the re-assessment was proposed to be made, had been paid and satisfied by the county upon the order of the board of commissioners without the request or consent of appellants, and that this payment had been made by the county more than six years before the institution of this proceeding; wherefore it was prayed that the amount be adjudged barred under the six years statute of limitations. Each of these paragraphs of the remonstrance, on motion of appellee, was struck out, and rejected, and the first contention of counsel in this appeal is that in this ruling the trial court erred. Appellants, in discussing the question sought to be raised by the first paragraph of their remonstrance, contend that the original assessment under the order of the board of commissioners was a final settlement or determination upon the question of benefits accruing to their lands and that, therefore, the board was precluded from making a second assessment to meet the deficit in the cost of improvement; or in other words, it is insisted that under the original order of the board the question of an additional assessment is *res judicata*.

The power or right of the board of commissioners, under

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the authority of the statute mentioned, to levy an additional assessment upon lands benefited by the improvement of a public road, when the original assessment proves to be insufficient, is no longer an open question, but is one which has been firmly settled by the decisions of this court, subject, however, to the right of any landowner to demand that in no case shall the assessments made upon his land, when considered in the aggregate, exceed the amount of the benefits to the land by reason of the improvement. *Board, etc., v. Fullen*, 111 Ind. 410; *Rogers v. Voorhees*, 124 Ind. 489; *Goodwin v. Board, etc.*, 146 Ind. 164, and cases there cited. The contention that the original order of the board is a final adjudication upon the question of re-assessment is not tenable, as such question was in no wise at issue in the original proceedings.

Among the matters, under section 5094 R. S. 1881, section 6858 Burns 1894, section 5094 Horner 1897, which the viewers appointed are required to report to the board of commissioners is "an estimate of the expenses of said improvement." It is true that the estimated expense of the work is a matter which the law intends should be taken into consideration by the board in making its order for the improvement, for, if it were disclosed to that body in any particular case by reliable facts that the cost of the work would exceed the estimate of the viewers, it certainly, under the law, would not be right for the board to undertake the improvement of the road. However, if the board is satisfied that the legitimate expenses arising out of or necessarily connected with the work will not exceed the estimate, and proceed to order that the desired improvement of the highway be undertaken, and it subsequently should be ascertained that the board was mistaken by reason of some unforeseen causes which have resulted in increasing the cost of the work beyond the original estimate, under such circumstances it could not in reason be said that the question of additional assessment to meet a deficit had been previously determined



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by the original order, and that, therefore, the right or power of the board to order a re-assessment to be levied no longer existed. *Board v. Fullen*, 111 Ind. 410.

In answer to the insistence of appellants that the court erred in rejecting the third paragraph of the remonstrance, it may be said that this is purely a proceeding, as it professes to be, to secure an additional assessment upon the lands in controversy for the purpose mentioned, and in no sense is it one for the recovery of money by the county, and the six-years statute of limitations interposed by appellants has no application. Neither can they, in order to defeat this proceeding, avail themselves of the alleged fact that the county, upon the order of the board of commissioners, had advanced the money to pay the deficit in dispute, and that the purpose of the assessment sought to be made was to reimburse the county for the money which it had paid. The county, under the circumstances, is entitled to be reimbursed for the amount, principal, and interest, which it has paid upon the expenses of the improvement. The statute is careful to protect the county against all loss or liability that it may incur upon the legitimate expenses rising out of the improvement, and the lands within the taxing district benefited thereby are, under the law, held liable to protect the county against loss. *Manor v. Board, etc.*, 137 Ind. 367; *Goodwin v. Board, etc.*, 146 Ind. 164; *Gavin v. Board, etc.*, 104 Ind. 201; *Little v. Board, etc.*, 7 Ind. App. 118. The court did not err in rejecting the first and third paragraphs of the remonstrance.

The next alleged error discussed by appellants is based upon the overruling of the motion for a new trial. Counsel in their brief, say, "This brings in review the facts found by the court." But the evidence, however, is not before us, and, in its absence, we must accept the finding of the court as correct. Many reasons which are assigned in the motion for a new trial have no legitimate place in such a motion, and therefore present no question for consideration. The other remaining reasons assigned in the motion depend upon the

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evidence, and, in its absence from the record, we are precluded from reviewing them.

The court made a special finding of facts, and stated its several conclusions of law thereon. Appellants did not except to these conclusions severally, but excepted jointly. The rule is, under such circumstances, that all of the conclusions must be wrong in order to render such an exception available. *Royce v. Bourne*, 149 Ind. 187, and cases there cited. *Evansville, etc., R. Co. v. State*, 149 Ind. 276. It cannot be successfully insisted in this case that all of the conclusions are wrong, and it must, therefore, follow that the exception to the conclusions does not serve to raise any question for our consideration.

Other errors assigned are not discussed by counsel for appellants in their brief, and therefore they must be deemed as waived. There is no available error, and the judgment is affirmed.

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ELLIS v. THE STATE.

[No. 18,714. Filed Nov. 29, 1896. Rehearing denied March 17, 1899.]

CRIMINAL LAW.—*Homicide.—Self-Defense.—Apprehension of Danger.—When Question for Jury.*—The evidence showed that deceased came to the house where defendant boarded, about 10 o'clock at night, and asked to stay overnight; that defendant went to the door and informed him that it was not a lodging house, and, after consulting the landlady, went back to the door and, having some words with deceased, closed the door, when deceased threw something and struck the house about three feet from the door; that defendant went to his bedroom and got his revolver, went to the door and fired at once at deceased, who had gone outside the front gate about fifteen feet away. There was no evidence that deceased attempted to enter the house, but defendant claimed that when he opened the door deceased made a movement as if to shoot or throw at him, and, upon this appearance, he fired the fatal shot. *Held*, that it was the province of the jury to determine whether the circumstances afforded reasonable grounds for defendant to apprehend that his life was in danger, or that he was in danger of great bodily harm. *pp.* 327-330.

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**CRIMINAL LAW.—Self-Defense.—Apprehension of Danger.—Evidence.**

—*Weight.*—*Homicide.*—Where in the trial of a criminal cause the jury, by their verdict, decided that defendant had no reasonable apprehension of danger when he shot deceased, it is not the province of the Supreme Court to weigh the evidence, if that part of it tending to support the verdict is legally sufficient to justify the finding of the jury. *p. 330.*

**SAME.—Evidence.—Examination of Defendant as to Previous Offenses.**—No error was committed in permitting the prosecuting attorney to ask defendant on cross-examination concerning certain prosecutions against him for criminal offenses committed by him previous to the commission of the offense for which he was being tried. *p. 331.*

**SAME.—Evidence.—Examination of Defendant as to Previous Offenses.**—Where defendant was cross-examined concerning certain prosecutions against him for criminal offenses committed previous to the offense for which he was being tried, he is not entitled to testify as to matters in excuse and extenuation of such acts. *p. 331.*

**SAME.—Evidence.—Previous Threats.—Homicide.**—In the trial of a case of homicide, previous threats of deceased are not admissible in evidence where it is not shown that such threats had been communicated to defendant before the homicide. *p. 331.*

**SAME.—Previous Threats.—Homicide.**—In the trial of a person charged with murder, previous threats made by deceased against defendant are not admissible in evidence, where it is not shown that deceased attacked defendant. *pp. 331-333.*

From the Putnam Circuit Court. *Affirmed.*

C. C. Matson, for appellant.

W. A. Ketcham, Attorney-General, Merrill Moores, John M. Rawley and A. W. Knight, for State.

McCABE, J.—The appellant was indicted in the Clay Circuit Court for murder in the first degree, in the killing of John F. Krack. The venue was changed to the Putnam Circuit Court, where a trial resulted in a verdict and judgment of guilty of murder in the second degree; the circuit court having overruled appellant's motion for a new trial. The action of the court in overruling the motion for a new trial is called in question by the assignment of errors as the sole ground upon which a reversal of the judgment is sought.

The first contention of appellant is that the verdict of the jury is not sustained by sufficient evidence, and is contrary to

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law. There were but two witnesses, besides the defendant, to the transaction. These two witnesses were Mrs. Brewer, the woman with whom appellant was living or boarding, and her daughter, about fourteen years of age. The defendant was a single man, about thirty years of age. The State's evidence consisted alone of the testimony of this family, and the statement made by the defendant to the prosecuting attorney the next day after the death of Krack, and his statement at the coroner's inquest.

The evidence showed that defendant, about fifteen years prior, had purchased a forty-four caliber Remington revolver and belt of a cowboy, and had been fined for carrying the same concealed about his person, and had been prosecuted and convicted of shooting at James Ragland, and, shortly after, he was again fined for an assault on said Ragland with a revolver, and a little later he shot John Ragland in the shoulder while the two were engaged in a controversy. He frequently carried his revolver in a belt while at his work. About two years before, he moved to Clay county from Putnam county, and began boarding with a Mr. Brewer who lived at Center Point, in Clay county. Afterward, Brewer moved to a farm about a mile from there, and appellant went with them and boarded for about a year.

At the request of Mr. Brewer, appellant quit boarding at his house, but he continued to visit the house. A separation between Brewer and his wife ensued, and a divorce was granted to Brewer. Mrs. Brewer moved to Brazil, and appellant assisted her in the removal, and in a few weeks became a boarder in her house. There was some evidence that the character of Krack was not good, but the witnesses to that effect were but three, though he had lived there many years.

On the night of March 9, 1898, appellant attended a Salvation Army meeting with Mrs. Brewer, and they returned home about ten o'clock, or a little later. Mrs. Brewer and her daughter had retired for the night, while appellant was

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left sitting in the front room, reading, when some one knocked at the front door. And the evidence tended to show that appellant went to the door, and asked who was there. The answer came that it was Fred Krack, and thereupon appellant opened the door. Krack then asked if Mrs. Brewer lived there, and, when told she did, Krack said he desired to stay all night. Appellant replied that that was not a lodging house. Krack said that Mrs. Brewer had told him some time before that she was going to keep boarders, and that, at any time he was in town, to come around and get his meals and stay overnight. Appellant responded that he would ask Mrs. Brewer, and went back into the house; and, after talking with her, he returned to the front door and told Krack that Mrs. Brewer said she could not keep him. Then Krack said he had the money to pay for his night's lodging, and insisted on staying overnight. Appellant then asked Krack if he was not sent there, and, getting no satisfactory answer, appellant asked him a second time, "Now, was not you sent here?" and Krack said, "No." A few words of a similar character were spoken, and then appellant closed the door; and just as he closed the door and started to go back into the room, Krack threw something, which struck the house about three feet from the door, which turned out to be a beer bottle. Appellant then went through the sitting-room and into Mrs. Brewer's bedroom to his trunk, took the key from his pocket, unlocked his trunk, got his forty-four caliber Remington revolver; and, as he started to the front door, Mrs. Brewer said to him, "For God's sake, Fred, don't go out there and go to shooting," and appellant replied, "Do you suppose I am going to allow a man to throw or shoot at me? No." Appellant then went to the front door, opened it and fired at once, the ball striking the deceased in the abdomen, penetrating a vital part, from which he shortly afterwards died. Appellant, without knowing whether the ball took effect, went into the sitting-room and resumed his reading. When the shot was

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fired, Krack was at the front gate, on the outside, and the gate shut, about fifteen feet from the front door.

Appellant testified that deceased had started toward the gate when appellant closed the door, and, just as he closed the door, Krack threw and struck the house. There is no evidence that Krack ever at any time attempted to enter the house. Mrs. Brewer testified that she and appellant had discussed the probability of Mr. Brewer, her former husband, sending some one to her house some time to find out how they were living, and that Ellis had said that she might depend upon it that he would do something of that kind. Appellant claims that, when he opened the door, Krack made a movement as if to shoot or throw at him, and, upon this appearance of things, he fired the fatal shot. But appellant testified that Krack had his arm down at his side from the time he opened the door until he fired the shot, and from this appearance of things, he thought Krack was going to either shoot or throw something at him.

At another time, appellant testified that Krack "was in a position as though he was going to throw something at me or trying to get something out of his hip pocket," and again he testifies that he never saw him put his hand back to his hip pocket. Both he and Mrs. Brewer and her daughter testify that he fired as soon as he got the door open.

From this evidence, it was the exclusive province of the jury to determine whether the circumstances afforded reasonable grounds for appellant to apprehend that his life was in danger or that he was in danger of great bodily harm from Krack. Without such reasonable apprehension, appellant was not justified in firing the fatal shot. By their verdict the jury has decided that the evidence furnishes no reasonable ground for such apprehension when appellant shot the deceased. It is not our province to re-weigh the evidence, if that part of it tending to support the verdict is legally sufficient to justify the finding of the jury. We are of opinion that it was.

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The appellant contends that his motion for a new trial ought to have been sustained because the court erred in permitting the prosecuting attorney to ask the defendant, on cross-examination, as to certain prosecutions against him for criminal offenses committed by him previous to the offense here charged, for the purpose of discrediting his testimony. That such rulings are not erroneous is well settled in this State. *Parker v. State*, 136 Ind. 284; *Bessette v. State*, 101 Ind. 85; *Blough v. Parry*, 144 Ind. 463.

Appellant also complains that the court erred in refusing him the right to testify to matters in excuse and extenuation of his acts on which the prosecution had been based. There was no error in such refusal, because that would have involved the trial of several other issues collateral to the issue the jury had been sworn to try, and thereby endangering the loss of the sight of the issue on trial. Accordingly, Judge Gillett, in his work on Indirect and Collateral Evidence, says: "A witness who admits his conviction of an offense cannot be permitted to state that he was not guilty."

It is further complained by appellant, under the motion for a new trial, that the court erred in excluding the testimony of the witness Cox to the effect that the deceased, Krack, had said to him on the afternoon of the day of, and before, the homicide, while he was on his way to Brazil, that he was going to Brazil to have trouble with Ellia. It is true that, in a case of homicide, previous threats by the deceased are admissible, especially if they have been communicated to the defendant before the homicide. *Wood v. State*, 92 Ind. 269; to the same effect is *Leverich v. State*, 105 Ind. 277. But there was no proof that such statement had been so communicated to the defendant before the homicide. Some courts hold threats are admissible without having been previously communicated to the defendant. Conceding, however, without deciding, that the offered evidence amounted to a threat against the defendant, we think it was immaterial, and therefore inadmissible. The evidence fails to show an attack on

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the defendant by the deceased. Even if throwing the beer bottle against the house could be construed into an attack on the defendant, which we by no means concede, still, that was all over, passed, and gone, and the deceased had started away, and got outside of the gate, and had it closed, when the defendant went to the front door the second time, and fired immediately on opening the door, taking time only to say, "You had better get away from here now." When he made this remark, Krack had closed the gate, and had started down the sidewalk, and was a few feet from the gate; and the deceased turned around, with his face toward the defendant, on hearing defendant's remark, and was instantly shot. The evidence fails to show that the deceased said anything worse to the defendant than to "ask him if I did not knock at the door like a gentleman," in response to defendant's order. "You had better get away from here now."

In *Leverich v. State*, 105 Ind. 277, this court quoted section 757 of Wharton's Criminal Evidence, as correctly expressive of the law. The latter part of that section is peculiarly pertinent to the question here involved. It reads thus: "The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if in such case, A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence. And so it has been frequently held. They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger."

The evidence makes it too clear for reasonable controversy that at the time the fatal shot was fired there was no attack on the defendant, and that he was in no danger, either real or



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apparent, it appearing therefrom that deceased was wholly unarmed.

There was no error in rejecting the offered evidence, nor was there any error in overruling appellant's motion for a new trial. The judgment is affirmed.

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THE LAKE ERIE AND WESTERN RAIL-  
ROAD COMPANY ET AL.

152	888
157	800
158	888
168	419
163	414

[No. 17,994. Filed March 28, 1899.]

**CARRIERS.—Damages by Fire.—Exemption.—Negligence.**—A special contract exempting a carrier from liability for loss or damage caused by fire is valid, but such exemption does not protect the carrier when the fire or the consequent loss is the result of his own negligence. *p. 335.*

**SAME.—Damages by Fire.—Exemption.—Negligence.—Burden of Proof.**—In an action against a carrier for the loss of goods by fire the burden is upon plaintiff to show that the loss was the result of the negligence of the carrier, where by the terms of the bill of lading the carrier was exempted from liability for losses caused by fire. *pp. 335-341.*

**NEGLIGENCE.—Carriers.—Loss of Goods by Fire.**—Placing a car loaded with cotton on a side-track cannot be held to be the proximate cause of the loss of the cotton by fire, where there was no proof that it took fire at that place. *pp. 341, 342.*

**SAME.—Railroads.—Carriers.**—A railroad company is not required to place its cars temporarily standing on side-tracks, within fire and police protection. *p. 342.*

From the Marion Superior Court. *Affirmed.*

*W. A. Ketcham, Lewis G. Farmer and F. E. Matson, for appellant.*

*W. H. H. Miller, Ferdinand Winter, John B. Elam, McCullough & Spaan, A. C. Harris, John E. Iglehart and Edwin Taylor, for appellees.*

**DOWLING, J.**—Suit by the appellant against the Lake Erie and Western Railroad Company, the Evansville and Terre Haute Railroad Company, and the Chicago and Eastern

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Illinois Railroad Company, as members of an association known as the "Midland Line," for the loss of fifty bales of cotton shipped under a bill of lading from Memphis, in the state of Tennessee, (U. S. A.) to Liverpool, England.

The Midland Line was an association of steamship and railroad companies acting as common carriers between the points named.

The appellant had issued a policy of insurance upon the cotton, and the property so insured having been destroyed by fire while in transit, appellant was compelled to pay the amount of the risk. Upon such payment, the bill of lading, with all rights of action thereunder, was assigned and transferred to appellant by the owner of the cotton. As such assignee, and claiming to be subrogated to the rights of such owner, the appellant sued to recover damages for the loss of the cotton.

The complaint was in two paragraphs, to the first of which a demurrer was sustained. The answer to the second paragraph was a general denial. The case was tried by a jury, and, at the conclusion of the evidence, the court refused to give any of the instructions asked for by appellant, and directed a verdict for appellees. Thereupon judgment was rendered and the insurance company appeals. The only error assigned is that the court erred in overruling the motion of the appellant for a new trial.

The paragraph of the complaint upon which the case was tried sets out the traffic arrangement between the defendants; the shipment of the cotton over defendants' lines under a bill of lading *exonerating appellees from liability in case of the loss of the cotton by fire*; and it alleges the destruction of the cotton *by fire* while in the possession of the Lake Erie and Western Railroad Company, one of the appellees. It charges that the loss of the cotton was occasioned by the negligence of the appellees, and states with some particularity, the circumstances under which the fire occurred. The other

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facts necessary to show a right of action in appellant are fully and properly pleaded.

That part of the contract in the bill of lading which limited the liability of the appellees, was in these words: "(1) That the said Midland Line shall not be liable for \* \* \* loss or damage by fire. \* \* \* It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned \* \* \* by fire from any cause, or wheresoever occurring."

It is settled by the decisions in this State that the carrier may by a stipulation contained in the bill of lading limit, to some extent, his strict common law liability. *Adams Express Co. v. Fendrick*, 38 Ind. 150; *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281; *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500. He cannot, however, by contract, exempt himself from liability for loss or damages resulting from his own negligence. *Michigan, etc., R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Indianapolis, etc., R. Co. v. Allen*, 81 Ind. 394; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360.

It has often been held that a special contract relieving the carrier from responsibility for loss or damage by fire is valid, but it is generally understood that such exemption from liability does not protect the carrier when the fire or the consequent loss is the result of his own negligence. 4 Elliott on Railroads, section 1508, note 8.

The effect of a special contract limiting the common law liability of the carrier is to change the character of that liability by removing from it the important element of insurance of the goods by the carrier, and to place his responsibility for loss or damage upon the ground of *negligence* alone. The carrier does not, indeed, cease to be a carrier, but he is no longer an insurer. In numerous cases he is held, under such circumstances, to be a private carrier for hire, and hence sub-

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ject to an entirely different rule from that which would have fixed his responsibility if no special contract had been made.

The controlling question in the present case is as to the burden of proof. On this subject there is an irreconcilable conflict among the decisions, and it would be a fruitless task to institute a comparison between them. The great weight of modern authority, and, as we think, the better reason sustain the rule that where the action is upon a bill of lading which limits the liability of the carrier by excepting certain perils, and it appears that the loss was within the restrictions of the special contract, the burden is upon the *plaintiff* to show that the accident or loss was the result of the negligence of the carrier.

This rule was long ago adopted by the English courts.

In *Harris v. Packwood*, 3 Taunt. 264, the carrier had given notice that he would not be accountable for any package whatsoever, above the value of twenty shillings, unless entered, and an insurance paid over and above the price charged for carriage according to value, no such insurance having been paid by the plaintiff. It was said by Mansfield (Sir J.) Ch. J.: "However, we may wish the law to be, we cannot make it different than as we find it. In looking into the books, we find the special acceptance much older than I had supposed it to be. And it leads to great frauds, for on account of the number of persons always attending about these open wagon-yards and offices, every person standing around is apprised that this or that parcel contains watches or jewels to the amount of many hundred pounds; this is a great inconvenience, but however inconvenient it is, it seems that from the days of *Aleyn* down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained; then the question is, whether this loss is within the contract that has been made, and, it seems, according to one or two of the cases, that it is not; for the losses have been of a very suspicious nature; in one case, the parcel seems to have been lost before it left the yard but, however, as there

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was no proof here of express negligence, it seems that there must be a rule absolute for a nonsuit."

In *Marsh v. Horne*, 5 Barn. & Cress. 322, Abbott, C. J., said: "A person may engage to place goods in a course of conveyance and delivery, and yet declare that he will not be answerable for their loss. Indeed, this argument would altogether defeat the notices given by carriers, which have now prevailed in practice for so many years, and been recognized by so many decisions. And considering the notice given in the present case, we think the defendant could not upon the delivery of the goods have maintained a charge for any sum beyond the reasonable price of carriage, *exclusive of the responsibility of the risk for loss*. And as to the first point made in the argument, it may with equal propriety be said that the plaintiff, who was informed of the defendant's advertisement, and did not offer to comply with its terms, *chose to stand his own insurer*, as that the defendant, who knew the value of the goods to exceed five shillings, and did not demand to be paid for insurance, engaged, nevertheless, to take a responsibility upon himself and indemnify the plaintiff."

In *Muddle v. Stride*, 9 Car. & P. 380, which was an action against the proprietors of a steam vessel to recover damages for goods sent by such vessel and lost, Lord Chief Justice Denman, in summing up to the jury, observed that the jury were "to see clearly that the defendants were guilty of negligence before they could find a verdict against them."

Many cases in the Supreme Court of the United States hold that, when the loss falls within the exception in the bill of lading or contract of the carrier, the *onus probandi* is upon the shipper to show negligence on the part of the carrier.

*Clark v. Barnwell*, 12 How. 272: "After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bring-

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ing the particular loss or damage within one of the dangers or accidents of the navigations, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him."

In *Transportation Co. v. Downer*, 11 Wall. 129, Field J., delivering the opinion of the court, said: "On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation." (The bill of lading, given by the company, exempted it from liability for losses by dangers of navigation on the lakes and rivers.) "These terms, 'dangers of lake navigation,' include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence

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and inattention rested with the plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect, the court erred."

See, also, 5 Am. & Eng. Enc. Law (2nd ed.) p. 360, and cases decided by federal courts, collected in note 1.

The same views have been expressed by many of the state courts in carefully prepared opinions, among which may be named: *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Cochran v. Dinsmore*, 49 N. Y. 249; *Whitworth v. Erie, etc., R. Co.*, 87 N. Y. 413; *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53; *Colton v. Cleveland, etc., R. Co.*, 67 Pa. St. 211, 5 Am. Rep. 424; *Patterson v. Clyde*, 67 Pa. St. 500; *Pennsylvania Co. v. Raiordon*, 119 Pa. St. 577, 4 Am. St. 670; *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 171, 24 Atl. 678, 30 Am. St. 800; *Smith v. American Express Co.*, 108 Mich. 572, 66 N. W. 479; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Kallman v. United States Ex. Co.*, 3 Kan. 205; *New Orleans, etc., Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Wilson v. Southern Pacific, etc., R. Co.*, (Cal.) 7 Am. & Eng. R. Cas. 400; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 1 Am. Rep. 659; *Mitchell v. United States Ex. Co.*, 46 Iowa 214; *Kansas, etc., R. Co. v. Reynolds*, 8 Kan. 623; *Smith v. North Carolina R. Co.*, 64 N. C. 235; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523. See also Hutch. on Carr., section 767; Ang. on Carr., 276; 4 Elliott on Railroads, section 1516, p. 2347.

The question as to the burden of proof in such cases, so far as we have been able to discover, has not been directly decided by the Supreme Court of this State. In *Adams Express Co. v. Fendrick*, 38 Ind. 150, the court say (Worden J.): "We need not determine whether, in such case, the burthen of proving negligence on the part of the carrier devolves upon the shipper or consignee, or whether the burthen

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of disproving it devolves upon the carrier. The paragraph of the answer we deem good on either theory, inasmuch as it sets up the loss in such manner as, *prima facie*, at least, excludes the inference of negligence on the part of the defendant."

The opinion in the case of the *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 7 L. R. A. 339, quotes with approval the rule hereinbefore stated concerning the burden of proof as laid down in *Wheeler on Carr.* 252, and *Hutch. on Carr.* (2nd. ed.) sections 259 and 736; but, as the property, the loss of which was the subject of controversy in that case, was live stock, and the question here presented was not directly involved, it cannot be said that the point, as to the burden of proof, was decided.

In *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, it is held that, in an action upon a bill of lading exempting the carrier from liability as to a particular peril, the burden of showing negligence is upon the plaintiff.

The reasons by which the opposite view is maintained, while often plausible, are not always sound. Such as are deduced from the strictness of the common law, touching the liability of the carrier, lose much of their force when it is remembered that at least as early as the year 1648, in England, the carrier was permitted to limit his responsibility. His right to do so, not only by express contract, but by notice to the shipper, and even by public advertisement, is recognized in numerous cases.

Much of that strictness, too, was due to the condition of society; to the wild and unsettled state of the country; the frequency of highway robberies; the absence of police protection; the crude methods of carrying on business; the circumstance that goods were usually transported across the country in stages, and other like vehicles, inadequately equipped and insufficiently guarded; and the disreputable character and dishonest practices of many of those engaged in the business of carriers. Something of this kind is indicated in the



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language of Lord Holt, Ch. J., in *Lane v. Cotton*, 1 Salk. 17, where he says: "It is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it."

It appears also from the statement of Mansfield (Sir J.) Ch. J. in *Harris v. Packwood*, 3 Taunt. 264, where he says: "And it leads to great frauds, for on account of the number of persons always attending about these open wagon-yards and offices, every person standing around is apprised that this or that parcel contains watches or jewels to the amount of many hundred pounds."

The extreme illustrations made use of in many opinions prove nothing. If such cases occur, they are exceptional, and afford no foundation for a general rule. The occurrence of the accidents and perils by which goods are damaged or lost while being transported overland, or on the rivers, lakes, or seas, is usually open and notorious. Knowledge of the facts is seldom confined to the carrier, or to a few agents who are subservient to his interests and subject to his control. The persons employed upon a railroad, or engaged in navigating a vessel, are not generally disposed to shield their employer by sinister means, and are probably quite as often subject to the charge of undue prejudice against him as of undue partiality toward him.

Neither is any serious danger to be apprehended from the imposition of unfair and unjust terms upon the shipper by the carrier. The form and conditions of the contracts of the carrier are in most cases subject to legislative control, and it is to be presumed that, whenever it becomes necessary to protect the people of the State from imposition, the legislative remedy will be applied.

The second paragraph of the complaint expressly charged that the destruction of the cotton was caused by the negligence of the appellees in exposing it to the danger of fire on the side-track of the Lake Erie and Western Railroad Com-

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pany, near Lafayette, Indiana, at a point where trains were constantly passing, and where there was no fire or police protection. Having alleged negligence, the plaintiff would probably be required to prove it, even if the allegation were unnecessary. Gould's Pl. (4th ed.) chapter 3, sections 185, 186 and 187.

But, upon this branch of the case, we find no evidence that the position of the car in which the cotton was stored was the proximate cause of the fire and loss, or, indeed, that it had anything to do with it. There was no proof that the cotton took fire at that place. For all that appeared, the cotton may have been burning inside the bales, or between the bales, for days before. It was not proved how, where or when the fire was communicated to the cotton. It would be the merest conjecture to say that it took fire at the place where it was actually burned. This substance is known to be highly inflammable, and it is peculiarly liable to destruction by this peril at all times, and at all places, while being transported by railroad. For this very reason the appellees refused to be responsible for a loss occasioned by fire, and the bill of lading so stated. The shipper became his own insurer. We do not think a railroad company can be expected to place its cars, when temporarily standing on side-tracks, in such situations that they can be watched by policemen, or be within reach of fire engines or other means for extinguishing fires.

As the evidence would not have sustained a verdict for appellant, the court did right in directing the jury to return a verdict for appellees.

There being no error in the record, the judgment is affirmed.

PACE v. THE STATE.

[No. 18,893. Filed Mar. 7, 1899. Rehearing denied Mar. 29, 1899.]

CRIMINAL LAW.—*Indictment.*—*Appeal and Error.*—The sufficiency of an indictment cannot be questioned for the first time on appeal.  
p. 343.

APPEAL AND ERROR.—*Record.*—*Evidence.*—The evidence cannot be considered on appeal where there is nothing in the transcript or certificate of the clerk to show that what purports to be the manuscript of the evidence embraces the evidence given at the trial.  
pp. 343-345.

From the Adams Circuit Court. *Affirmed.*

R. S. Peterson and S. Peterson, for appellant.

William L. Taylor, Attorney-General, and Merrill Moores, for State.

JORDAN, J.—Appellant was charged by indictment with the crime of rape, and upon a trial by jury he was found guilty, and, over his motion for a new trial, which challenges the verdict upon the grounds only that it is contrary to law and to the evidence, he was sentenced by the court to be imprisoned in the Indiana Reformatory for a term of not less than one year and not more than twenty-one years. From this judgment he appeals, and assigns as errors: First, that the court erred in overruling his motion for a new trial; second, the court erred in putting the defendant to trial on an insufficient indictment; third, the court erred in rendering judgment on the verdict of the jury against the appellant.

Counsel for appellant, for the first time, seek to assail the sufficiency of the indictment under the second specification of errors. It is manifest that this assignment, as formulated, presents no question for our consideration. *Barnett v. State*, 141 Ind. 149.

It is insisted that the verdict of the jury is contrary to the evidence, but, as the latter is not properly in the record, for the reasons hereinafter stated, we must dismiss appellant's con-

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*Pace v. State.*

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tention in this respect without consideration. All that the record discloses relative to the filing of any bill of exceptions embracing the evidence is that on January 17, 1899, the attorneys for appellant presented to "the court their bill of exceptions containing the longhand manuscript embracing the evidence, in these words (here insert), which said bills of exceptions are now, in open court, signed, sealed, and made a part of the record in this cause." Next after this entry follows the general and only certificate of the clerk of the lower court wherein he certifies "that the above and foregoing transcript contains full, true, and complete copies of the papers and entries in said cause, ordered to be set out therein by the written order of the attorney for the defendant, which written order is hereto attached."

This certificate is signed by the clerk, and attested by the seal of the court. Next following this certificate is the special bill of exceptions, embracing the motion for a new trial, and disclosing the date upon which the motion was filed. This special bill of exceptions is signed by the trial judge and after it, in the transcript, follows what purports to be the original longhand manuscript of the evidence as taken at the trial by a shorthand reporter. At the close of this manuscript of evidence appears the signature of the trial judge.

There is no certificate of the clerk, nor anything else appearing in the transcript, competent to show that the manuscript embraces the evidence given upon the trial. This document contains none of the formal parts of a bill of exceptions, and if it could be accepted as a bill embracing the evidence given upon the trial, there is nothing whatever to disclose that it is the same bill of exceptions which is shown to have been filed in open court, and directed to be set out by the words "here insert." That this entry, under the circumstances, cannot be considered as sufficient to show the filing of this identical bill, is settled by many decisions of this court. Upon any view of the case, it is so manifest that what

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purports to be the evidence in the case is not properly before us that we may dismiss the question without further comments. Judgment affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. MOORE, ADM.

[No. 17,905. Filed March 29, 1899.]

**APPEAL AND ERROR.—Harmless Error.**—Overruling a demurrer to a bad paragraph of complaint is not available error on appeal, where it clearly appears from the record that the judgment rests upon a good paragraph. p. 348.

**SAME.—Pleading.—When Cannot Be Aided by Verdict.**—Where a pleading has been tested by demurrer it cannot be aided by the findings of the special verdict, but must stand or fall by its own averments. p. 348.

**PLEADING.—Complaint.—Negligence.—Sufficiency of Averments as to Place of Injury.**—Averments in a pleading in an action against a railroad company for the death of an employee, caused by the negligence of defendant in operating trains within the corporate limits of a city, in a manner prohibited by ordinance, that defendant maintained yards and a telegraph office in such city; that deceased was employed as operator in said office; that it was his duty to receive and deliver orders to train crews passing said office, and in delivering an order he was struck by an engine and killed, sufficiently show that the place of the accident was within the corporate limits of such city. p. 349.

**MASTER AND SERVANT.—Negligence.—Railroads.**—An employee of a railroad company has a right to believe, and rely upon the belief, that the company will obey a city ordinance regulating the speed of trains and requiring all backing trains, or reversed engines, with tenders in front, to carry a light in front at night, and to sound the whistle and ring the bell. pp. 349, 350.

**SAME.—Negligence.—Railroads.—Co-Employees.**—In the trial of an action against a railroad company for damages on account of the death of an employee caused by the alleged negligence of the defendant, the jury have the right, under section 7083 Burns 1894, to impute the disregard of defendant's engineer of a city ordinance regulating the speed of trains, and the manner of backing trains, as negligence of defendant. p. 350.

**SAME.—Railroads.—Negligence.—City Ordinance Regulating Manner of Running Trains.**—The power of a city to pass an ordinance regulating the manner of running trains in the city limits is con-

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ferred as a police power, and the fact that a person is in the service of a railroad company affected by such ordinance presents no reason for depriving him of its protection. *p. 350.*

**RAILROADS.—Master and Servant.—Employers' Liability Act.—Contracts.—Release.—Voluntary Relief Association.—Election of Remedies.**—A contract voluntarily entered into by an employe with a relief department of the railroad company by which he was employed, agreeing that the acceptance of benefits from such relief department for injury or death should operate as a release of all claims for damages against the railroad company arising from such injury or death, is not a release within the meaning of section 7087 Burns 1894, declaring the contract void which exonerates a railroad company from a future liability to an employe for injuries sustained, as such contract is nothing more than a contract for a choice between two sources of compensation. The case of *Pittsburgh, etc., R. Co. v. Montgomery*, ante, 1, in so far as it conflicts with the foregoing doctrine is disapproved. *pp. 351-357.*

**SAME.—Master and Servant.—Voluntary Relief Association.—Contracts.—Release.**—Where a railroad employe entered into a contract with the relief department of the company to the effect that the acceptance of benefits from such department for injury or death should operate as a release of all claims against the railroad company arising from such injury or death, the acceptance of benefits from the relief department by his widow, who was the sole beneficiary named in the contract, will not bar a recovery for the wrongful death of decedent for the use of his child. *pp. 357, 358.*

From the Miami Circuit Court. *Reversed.*

*N. O. Ross and G. E. Ross*, for appellant.

*McConnell & Jenkins, Nelson & Myers, Charles A. Cole* and *A. N. Mahoney*, for appellee.

**HADLEY, J.**—Appellee brought this action to recover damages for the death of her husband, alleged to have been caused by the negligence of appellant. The complaint is in three paragraphs, to each of which a demurrer was overruled. The answer was in three paragraphs, a demurrer to the second of which was sustained. The reply to the third paragraph of answer was in three paragraphs, and a demurrer to the third paragraph thereof was overruled. The cause thus at issue was tried by the jury, which returned a special verdict assessing the plaintiff's damages at \$8,000. A judgment for

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\$8,000 was rendered in favor of the appellee. The action of the court, upon the demurrers, and in overruling appellant's motion for a new trial, for a *venire de novo*, for judgment on the special verdict, in arrest of judgment, and to modify the judgment is separately assigned as error.

The principal facts covered by the complaint are as follows: On the 5th day of July, 1893, plaintiff's decedent, Henry E. Moore, entered the employ of appellant as night operator, at its yard office in the city of Logansport, where, and in which capacity, he continued until February 16, 1894, when he received injuries resulting in his death; that on the fatal night, while engaged in discharging the duties imposed by his said employment, about 8:45 p. m., he had received by wire, and under directions of appellant had delivered an order to the conductor and engineer of freight train No. 77, while the same was running west through the yards at a rate of four or five miles an hour; and when decedent turned from delivering said message to return to his post of duty, and while in the line of duty, and without fault or negligence on his part, one of appellant's locomotive engineers, in the employ of appellant and in charge of appellant's locomotive, drawing appellant's wreck train upon appellant's main track, so carelessly and negligently ran said locomotive and wreck train eastward through said yards, with the engine reversed, the tender in front, and so carelessly and negligently managed and operated said locomotive and train, without giving any warning, or displaying any light, or ringing a bell or sounding a whistle, and at a speed of twenty miles an hour, as to, and did, without warning and without notice to plaintiff's decedent, negligently run upon and over the body of plaintiff's decedent, causing his death.

In the second paragraph it is further averred that Logansport is a city of 16,000 inhabitants, and, at the time of the injury to plaintiff's decedent, said city had ordinances in force, requiring trains to be run through said city, after sunset, at a speed not exceeding six miles per hour, and that

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trains and locomotives, being run backward, or with tender in front, should carry signal lights in front, and should be announced by ringing the bell and sounding the whistle, and that said engineer, so in the employ of appellant, and so in charge of appellant's said locomotive and wreck train, negligently ran said locomotive and tender backward at a speed of twenty miles per hour, within the limits of said town, without ringing the bell or sounding the whistle, or displaying any signal light in front of said tender, in violation of said city ordinance.

Appellee concedes that the complaint is grounded upon the first branch of the fourth clause of what is known as the Employers' Liability Act, section 7083 Burns 1894, which reads as follows: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any \* \* \* locomotive engine or train upon a railway."

Appellant's learned counsel first assail the complaint for failure to disclose in either paragraph some duty owing by appellant to the deceased that had not been performed, their contention being that all the perils pleaded were obvious and ordinary risks assumed by the deceased.

When it clearly appears from the record that the judgment rests upon a good paragraph of complaint, the overruling of a demurrer to a bad paragraph is not available error on appeal. Therefore, without considering the sufficiency of the first paragraph of complaint, which is urged upon our attention, we pass to the second, which sets out the facts in greater detail, and to which the special verdict seems to have been especially directed.

Appellee insists that, if any fundamental fact is insufficiently alleged, we may read into the complaint from the findings of the jury. This is not the law. When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record. *American Ins. Co. v. Replogle*, 114 Ind.



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1-7; *Cole v. Gray*, 139 Ind. 396-399; *Runner v. Scott*, 150 Ind. 441.

There is no longer any ground for contention over the rule that an employe assumes all the obvious and ordinary perils incident to his employment, and we find nothing in the statute, relied upon by appellee, to lessen the degree of diligence and responsibility required of the servant for his own protection.

Looking then to the facts pleaded in the second paragraph of complaint, for unperformed duty of appellant to the deceased, it is first insisted that it does not sufficiently show that the accident occurred within the corporate limits of the city of Logansport. It is averred that appellant maintained yards, and a telegraph office therein, "at" the city of Logansport; that the deceased was employed as operator in said telegraph office; that it was his duty to receive and deliver orders to train crews passing said office; and, in passing from said office to deliver an order to train number 77, westward bound on the main track, he was required to pass over a number of other tracks, etc., and was killed by the negligent act of the engineer, etc.; that the city of Logansport is an incorporated city of 16,000 inhabitants, and had in force on the fatal night an ordinance, etc.

In criminal pleading, in laying the venue, an approved form is to charge that the crime was committed "at Cass county," and the above averments, we think, sufficiently show that the place of injury was within the corporate limits of the city of Logansport.

While we apply the rule that a servant must look out for his own safety, and heed, at his peril, all open and ordinary dangers, we must also give force to the correlative rule, equally well established, that the servant himself observing due care, has a right to believe and to rely upon his belief, that the master has done his duty in the promotion of safety, and, in this instance, the deceased had a right to believe that appellant would obey the city ordinance which forbade the

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running of trains through the city at a greater rate of speed than six miles an hour, and that required all backing trains, or reversed engines with tenders in front, after night, to carry a light in front, and to sound the whistle and ring the bell. A disregard of the ordinance, under section 7083 Burns 1894, will extend to the engineer in the employ of appellant and in charge and management of its locomotive and train; and if said ordinance was disobeyed by said engineer, as averred, the jury would have the right to impute such disobedience as negligence. *Swindell v. State, ex. rel.*, 143 Ind. 153-168, 35 L. R. A. 50; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305. It will not do to say, as appellant contends, that the deceased, being in the service of the company, and familiar with the needs of the service, in running trains backward and forward through the yards, and sometimes at a great rate of speed, was not entitled to the protection afforded by the ordinance. The power of a city to pass such an ordinance is conferred as a police power for the protection of the public, and all the public; and because the deceased happened to be in the service of the company, within the inhibited territory, presents no reason for depriving him of its protection. *East St. Louis, etc., R. Co. v. Eggmann*, 170 Ill. 538, 9 Am. & Eng. R. Cas. (N. S.) 438, 48 N. E. 981; *Illinois, etc., Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Bluedorn v. Missouri, etc., R. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. 615. It follows, therefore, that the jury had the right to find, if the evidence warranted, that obedience to the city ordinances was a duty owing by appellant to the deceased, and its violation was not an assumed risk, but negligence of appellant.

The second paragraph of the complaint is good. The special verdict finds that Logansport is an incorporated city of 18,000 inhabitants; that the deceased was injured within the corporate limits of the city; that at the time of the accident the city had in force ordinances forbidding the running of trains through the city at a greater rate of speed than six

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miles an hour; that all engines running backward, with tender in front, after sunset, should display a bright light in front, and ring the bell continuously, while passing through the city; that these ordinances were being violated at the time of the injury. And in other respects the record affirmatively shows that the judgment rests upon the second paragraph of the complaint. We will, therefore, not consider the sufficiency of the first and third paragraphs of complaint.

The next question arises upon the sustaining of the demurrer to the second paragraph of the answer. This answer is pleaded to the whole complaint. It counts upon a contract of membership held by the deceased in an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," of which appellant was one; "that said department and its funds were managed by said lines without expense to the fund, and that they guaranteed the payment of all its obligations and made up all deficiencies in the fund to meet the payment of all benefits due its members; that said relief department had a set of rules and regulations by which it and its members were governed, and to which all persons assented, and agreed to be bound by, when they became members thereof, a copy of which was filed with and made a part of said answer; that the decedent on the 7th day of October, 1893, made application and became a member on the terms of the regulations by which said department was operated, and continued such member until his death; that his application, made over his own signature, contained this express stipulation and agreement, to wit: 'And I agree that the acceptance of benefits from the said relief fund for injury or death, shall operate as a release of all claims for damages against said company arising from such injury or death, which could be made by, or through me, and that I or my legal representatives, will execute such further instrument as may be necessary formally to evidence such acquittance.'" The book of regulations (a part of the contract) contained the following further provision, to wit:

"Should a member, or his legal representatives, bring suit against either of the companies now associated in administering the relief department, or that may hereafter be associated, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromise, any payment of judgment or amount in compromise shall preclude any claim upon the relief fund for such injury or death."

The answer further alleges that the appellee, Anna B. Moore, his then wife, was made his beneficiary in said fund, and, in event of his death, should receive the death benefit therein provided for, which was \$500, and that after his death she did receive from said fund, as such death benefit, said sum of \$500, and executed and delivered to the appellant her instrument in writing releasing it from all further liability. The questions arise, did the acceptance by the plaintiff of the death benefit from said relief department release her claim against appellant for the wrongful death of her husband, or does her act come under the protecting provisions of section 5, Acts 1893, chapter 130, p. 294, section 7087 Burns 1894? The language of the statute is: "All contracts made by railroads \* \* \* with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void."

Appellant insists that the contract set out in said second answer does not come within the provisions of the statute, while the contrary is maintained by the appellee. It will be noted that the inhibition of the statute is against the making of any contract exonerating a railroad company from a future liability to an employe. The statute attempts only to forbid such contracts as release the company from liability to an action under the provisions of the act, and the act provides, and seeks to regulate, no right of action except such

as spring from the negligence of the company or its employees. The only purpose of the statute, therefore, is to prohibit the making of contracts relieving a railroad from liability for future negligence of itself and certain of its employees. Is the contract pleaded such a one? It shows: That a number of railroads constitute the Relief Department of the Pennsylvania Lines West of Pittsburgh, of which appellant was one; that the associated roads assume control and administration of the department without cost to the fund; that they contribute largely to the fund; that they guarantee that the benefits stipulated for with employees shall be paid in full; that membership therein is voluntary; that the employe is entitled to his benefits, if disabled from any cause, from sickness, from accident, from his own fault as well as from the fault of the company. If disabled without fault of the company, the living or death benefit may be drawn from the fund without question. If by the fault of the company, he may, after injury, elect whether he will accept the benefits from the fund, or pursue his remedy at law against the company. And that, when he signs the contract, the only obligation assumed is that if injured by the fault of the company, he will not seek double compensation, by pursuing both the relief fund and the company. It further shows, in effect, that when disability comes, and all the facts and conditions are known to him, he is at perfect liberty then to choose between the relief fund and the treasury of the company—whether he will accept the sure and immediate benefits from the fund, or take his chances in the courts against the company, and that an adoption of one course shall be held to be an abandonment of the other. This is the essence of the contract pleaded. It bears no semblance to an absolute contract for the release of the company from liability, under the provisions of the statute.

The question here involved is not a new one to the courts. It has long been the law that a railroad shall not contract

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against liability for its future negligence, as being against public policy, in that such a right would induce carelessness for the safety of employes; and similar contracts with relief associations have often been before the courts of the country for construction.

In *Johnson v. Philadelphia, etc., R. Co.*, 163 Pa. St. 127, 29 Atl. 854, the court, having under review a contract in all material respects like the one here, says: "But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby."

In the case of *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. 628, in construing a contract, the same in terms as this one, the court says: "In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence."

In the case of *Otis v. Pennsylvania Co.*, 71 Fed. 136, the contract considered was identical with the one pleaded in this answer, and concerning it Baker, J., says: "As a general proposition, it is unquestionably true that a railroad company cannot relieve itself from responsibility to an employe for an injury resulting from its own negligence by any contract entered into for that purpose before the happening of the injury, and, if the contract under consideration is of that char-

acter, it must be held to be invalid. But upon a careful examination it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages."

In *Shaver v. Pennsylvania Co.*, 71 Fed. 931, Ricks, J., reached the same conclusion from the consideration of a similar contract.

Again in *Pittsburgh, etc., R. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507, the supreme court of Ohio expressed its view of a similar contract in the following words: "This claim arises, we think, from a misconception of the contract; in assuming that, by the contract, the employee releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case; that there is no waiver of any cause of action which the employee may become entitled to, and that it is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. When that occurs he is not stipulating for the future; he is but settling for the past. He accepts compensation for injury already received." The same view is held by the supreme court of Iowa, announced in *Donald v. Chicago, etc., R. Co.*, 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492, and by the supreme court of Maryland in *Fuller v. Baltimore, etc., Assn.*, 67 Md. 433, 10

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Atl. 237, and by the supreme court of Nebraska in *Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42; and to the same effect is the case of *Maine v. Chicago, etc., R. Co.* (Iowa), 70 N. W. 630, and that of *Lease v. Pennsylvania Co.*, 10 Ind. App. 47.

The contract forbidden by the statute is one relieving the company from liability for the future negligence of itself and employees. The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that, if the employee shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and, if he accepts compensation from the relief fund, he shall thereby forfeit his right of action against the company. It is nothing more or less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction.

But appellee contends that some of the cases cited above arose in states having no similar statute, and that the question of the railroad's contractual relief from liability was propounded as being against public policy, and not as in violation of a statute, and hence should not be accepted as authority. The answer to this is that the statute also rests upon public impolicy, or it has nothing whatever to stand upon.

The right to contract upon subjects of themselves lawful, by persons *sui juris*, is beyond legislative control, so long as the right is exercised without injury to the public. The right to contract is inherent, and inseparably connected with the right to own and control property, and "is a primary prerogative of freedom." 2 Whart. Cont., section 1061. Therefore, in construing the act in question, it must be assumed that the legislature intended to prohibit only such contracts as injuriously affected the public; and can it be said that a contract providing that in the future, when an injury may be suffered, the injured party shall then be free to choose



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which of two remedies will be most useful to him and most to be preferred, is against public policy? We do not see why, and are constrained to hold that the contract pleaded in the second answer is not within the inhibition of section 7087 Burns 1894, and that the same may be pleaded as a defense.

We are mindful that this court, in the case of *Pittsburgh, etc., R. Co. v. Montgomery*, ante, 1, held a view of this question at variance with the opinion herein expressed, and which, after a more thorough examination of the decided cases, we find to be in conflict with the very decided weight of authority. Indeed, the cases seem now to be in substantial accord.

The case of *Miller v. Chicago, etc., R. Co.*, 65 Fed. 305, the only case relied upon as authority upon this question, was subsequently appealed to the United States Circuit Court of Appeals, Eighth District, and the doctrine of the lower court inferentially disapproved, by the court announcing, in substance, that the authorities were all the other way, though the question here was not decided, as not being necessary to a disposition of the case. *Chicago, etc., R. Co. v. Miller*, 22 C. C. A. 264. So far as the case of *Pittsburgh, etc., R. Co. v. Montgomery*, supra, is in conflict with the opinion herein announced, the same is disapproved.

As before stated, the second answer goes to the whole complaint. The plaintiff, as administratrix, sues for the use of herself as widow, and for the infant child of the decedent, under section 285 Burns 1894, section 284 Horner 1897. Under this statute, if the intestate had a cause of action against appellant for his injuries, death ensuing therefrom, a right of action accrued to his personal representative for the use of his next of kin.

Whether the right of the administratrix was but a continuation of the intestate's right to sue, as contended by appellant, or whether it was a newly created right, as our cases hold, is unimportant here. However it may be, the right exists only by virtue of the statute, and exists, not for the

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benefit of the intestate's estate, but as a source of compensation to those who by the death become the parties injured by the wrongful act of the defendant. *Hilliker v. Citizens St. R. Co.*, ante, 86.

The deceased at the time of his death had not elected whether he would accept compensation from the relief fund or seek his damages by action at law against the appellant. Subsequent to his death the plaintiff, as widow, and who was named in the contract as the sole beneficiary of the death benefit, accepted the stipulated amount, \$500, in full satisfaction, and executed to appellant a release from further liability. Appellant contends that, since the widow was the sole beneficiary named in the contract with the relief department, her acceptance of the full sum extinguished all further claim against the company. We cannot assent to this proposition. Before death came to Moore, he had a cause of action against appellant that he had not released. Upon his death the law conferred a right of action upon his representative for the use of his next of kin,—for the use of his child as well as for the use of his widow; and no act of the latter, without the lawful consent of the child, will deprive the child of its benefit. The widow could only release what she was entitled to. *Chicago, etc., R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120.

The answer avers that after the death of her husband, and after she had become a beneficiary in a right of action against the company, without fraud she agreed with appellant, and accepted the \$500 death benefit in full satisfaction of her claim growing out of the death of her husband; and there is perceived no sufficient reason why she should not be bound by it. But her release in no way affected the rights of the child, and for the use of the child's estate, in her representative capacity, the plaintiff has the right to maintain this action. It follows that as the second answer was pleaded to the whole complaint, and is good only as to a part, the demurrer thereto was properly sustained.

The third paragraph of answer was partial and was ad-

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dressed only to so much of the complaint as sought a recovery for the use of the widow. It averred that after the death of her husband, in consideration of \$500, she fully released the appellant.

The plaintiff replied to the third answer in three paragraphs. In the third paragraph she set up substantially the same facts and exhibits as were set out in the second paragraph of answer, and averred that the \$500 was received by her under and in pursuance of her deceased husband's contract with said relief department, and not otherwise, and that said contract was invalid and void.

To this paragraph of reply a demurrer was overruled, which forms the basis for appellant's fifth assignment of error. The question presented by this reply is the same as that considered at length as arising upon the second paragraph of answer, and, for the reasons there given, we hold that the court erred in overruling the demurrer thereto. For this error the cause must be reversed.

Judgment reversed and cause remanded, with instructions to sustain appellant's demurrer to the third paragraph of reply to third paragraph of answer, and for further proceedings in accordance with this opinion.

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THIEME, TRUSTEE, v. ZUMPE.

[No. 18,547. Filed Jan. 5, 1899. Rehearing denied March 30, 1899.]

**WILLS.—Construction.—Life Estate.—Right of Possession.—Trustee.**

—A testatrix in one item of her will bequeathed certain property to her daughter "subject to the provisions contained in item ten of this will." Item ten provided that a person named as trustee for her should take charge of all the property given her by the will, except certain real estate devised in another item of the will, and that he pay her annually the net income therefrom, and that upon her death he turn over said property to her children. *Held*, that the daughter takes only a life interest in the property, and that the right of possession is in the trustee. *pp.* 360, 361.

**REPLEVIN.—Pleading.—Complaint.—Demand.—Wills.**—A complaint in an action in replevin containing a general allegation of unlawful

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possession and wrongful detention which fails to allege a demand before action is bad as against a demurrer, where the specific averments show that defendant is in possession of the property under a claim of right by the provisions of a will in which he was made trustee of the property. pp. 361, 362.

From the Tippecanoe Circuit Court. *Reversed.*

*John M. La Rue* and *A. Orth Behm*, for appellant.

*John F. McHugh* and *Joseph Eacock*, for appellee.

BAKER, J.—The parts of the will of Elizabeth Thieme, necessary to the decision of this case, read: "Item 4. I give, devise and bequeath to my children Charles C. Thieme, Sophia Zumpe, John Henry Thieme, Frederick Thieme, and my grandchildren Edward Thieme and John Thieme, children of my son William Thieme, deceased, all the remainder of the real and personal property of which I may die seized or possessed; the said grandchildren both together receiving the undivided one-fifth part thereof. \* \* \* And the share bequeathed by this clause to my daughter Sophia Zumpe is made subject to the provisions contained in item ten of this will." \* \* \* "Item 10. My daughter Sophia Zumpe is afflicted with deafness and is now the mother of nine children; and it is for these reasons that I have favored her and her children by giving them the farm they now reside on (item three of the will), over and above her full share in my estate. And that she may not be taken advantage of by any one, I hereby appoint my son John Henry Thieme a trustee for her and direct that he take charge of all the property, real and personal, bequeathed to her by this will, except however the said farm, and that he pay to her annually the net income or profits derived from her said share, and that upon her death he turn over said property to her children, if of age, or to their legally appointed guardian, if minors."

Sophia Zumpe brought this action in replevin against John Henry Thieme as trustee, alleging that by the will she was the owner and entitled to the immediate possession of person-

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alty, particularly described. Demurrer to complaint overruled. Judgment for plaintiff on defendant's refusal to plead further.

Item four refers to item ten. The two must be read together. Taking all that relates to appellee and her ownership of personalty, there results: "I bequeath to Sophia Zumpe one-fifth of the remainder of the personal property, \* \* subject to the provisions \* \* \* that John Henry Thieme, as trustee for her, take charge thereof, and that he pay her annually the net income therefrom, and that upon her death he turn over said property to her children."

Appellee contends that item four gives her the absolute ownership, and that item ten, instead of diminishing her quantity of interest, attempts to deprive her of the rights of possession and of disposition, inseparable attributes of unqualified title. *Mulvane v. Rude*, 146 Ind. 476; *Jones v. Port Huron, etc., Co.*, 171 Ill. 502, 49 N. E. 700.

Item four contains not merely words that, taken alone, would pass absolute title; it states that the bequest to appellee is made "subject to the provisions of item ten." That is: "I give this property to my daughter Sophia to the extent and in the manner provided in item ten." Item ten directs the trustee, upon the death of Sophia Zumpe, to "turn over" the property to her children. An unqualified direction in a will to "turn over" personalty to a legatee is as effectual to pass title as would be the use of the words "give and bequeath." Item ten directs the trustee to "take charge of" this personalty and to "pay to appellee annually the net income" during her life. The direction to take charge of the personalty gives the right of possession. The direction to the trustee to pay the annual net income to the legatee during life gives a life interest only. For appellee's want of absolute ownership and right of possession, the demurrer to her complaint should have been sustained.

Appellant urges also that the complaint is bad for failing to allege demand before action. The complaint sets forth the

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will, avers settlement of the estate and appellant's possession of the personalty described. Relating to appellant's possession, the allegation is: "Plaintiff further alleges that the defendant, claiming to act under clause ten of said will, holds said property and refuses to deliver the same to plaintiff." There is also the averment "that the defendant has possession thereof without right and unlawfully detains same from plaintiff." The specific averment that appellant is in possession, claiming under item ten, which would give him the right of possession, if good, and a color of right, if voidable, overcomes the general allegations of unlawful possession and wrongful detention. For this reason, too, the demurrer should have been sustained.

Appellee insists, however, that, irrespective of the construction to be placed upon the will, the averments that she is owner and entitled to immediate possession, and that appellant's possession is unlawful and detention wrongful, make a sufficient complaint. In view of the specific statement of the character of appellee's title, these general allegations are overborne and become mere conclusions of the pleader.

Judgment reversed.

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MORGAN ET AL. v. ROBBINS ET AL.

[No. 18,474. Filed March 31, 1899.]

**WILLS.—Construction.—Legacy.—Vesting of Estate.**—A bequest of \$4,000 to testator's daughter, and providing that "If she shall die leaving no child surviving her, then said \$4,000 shall be equally divided among my other heirs," refers to the death of such legatee during the lifetime of the testator.

From the Greene Circuit Court. *Affirmed.*

*Emerson Short*, for appellants.

*Davis & Moffet*, for appellees.

**MONKS, C. J.**—George C. Morgan died testate in Greene county, Indiana, on December 15, 1894, leaving surviving him four sons and a daughter, Mary Morgan. The will

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which was executed in February, 1893, was duly admitted to probate at said county. Mary Morgan, the daughter of said testator, married appellee Robbins in 1895, after the death of the testator; and she died intestate in 1896, leaving her husband, the appellee Robbins, and no child or children, or their descendants, surviving her.

The question presented in this case arises upon the following clause of said will: "I also give and devise to my said daughter, Mary Morgan, the sum of \$4,000 and all my household goods. If she shall die, leaving no child surviving her, then said \$4,000 shall be equally divided among my other heirs."

If the words in regard to the death of Mary Morgan refer to her death during the lifetime of the testator, this cause is to be affirmed; but, if they refer to her death after the death of the testator, the cause is to be reversed.

The settled rule in this State is that where real estate is devised in terms denoting that the devisee shall take an absolute interest on the death of the testator, coupled with a devise over in case of his death without issue, the words refer to a death during the lifetime of the testator, and the primary devisee surviving the testator takes an absolute interest. *Moore v. Hare*, 144 Ind. 573, 575, and cases cited; *Moore, Adm., v. Gary*, 149 Ind. 51, 56, and cases cited; *Fowler v. Duhme*, 143 Ind. 248, and cases cited. The same rule applies to bequests of personal property. *Heilman v. Heilman*, 129 Ind. 59, 62; *Holbrook v. McCleary*, 79 Ind. 167; *Morrison v. Truby*, 145 Pa. St. 540, 546, 547, 22 Atl. 972, and cases cited; *King v. Frick*, 135 Pa. St. 575, 19 Atl. 951, 20 Am. St. 889; *Stevenson v. Fox*, 125 Pa. St. 568, 17 Atl. 480; *Fitzwater's Appeal*, 94 Pa. St. 141; *Mickley's Appeal*, 92 Pa. 514, 517; *Biddle's Estate*, 28 Pa. St. 59.

Under the law as declared in this State, it is clear that the words in regard to the death of Mary Morgan referred to her death during the lifetime of the testator, and that her

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right to the legacy of \$4,000 became vested and was absolute at the death of the testator.

The judgment is therefore affirmed.

THE WINDFALL NATURAL GAS, MINING AND OIL  
COMPANY v. TERWILLIGER ET AL.

[No. 18,577. Filed March 31, 1899.]

APPEAL AND ERROR.—*Assignment of Error.*—*Motion to Modify Special Finding.*—An assignment of error that the court overruled appellant's motion to modify its special finding of facts will not be considered, where the record does not show that such motion was filed. *p. 365.*

PRACTICE.—*Motion to Modify Special Finding.*—There is no rule of practice authorizing a motion to modify a special finding of facts. *p. 365.*

APPEAL AND ERROR.—*Bill of Exceptions.*—The record must affirmatively show that a bill of exceptions was signed by the trial judge before it was filed with the clerk. *p. 366.*

INJUNCTION.—*Laying Pipe Line on Land of Another Without License.*—*Removal by Landowner.*—A gas company that lays a pipe line through lands without permission of the owner is not entitled to maintain a suit to enjoin the landowner from removing the pipe line. *pp. 366, 367.*

From the Tipton Circuit Court. *Affirmed.*

W. O. Dean, G. H. Gifford and J. R. Coleman, for appellant.

J. A. Swoveland and J. F. Pyke, for appellees.

JORDAN, J.—The Windfall Natural Gas, Mining & Oil Company, appellant herein, is a corporation organized under the laws of this State for the purpose of furnishing gas to the citizens of Windfall, in Tipton county, Indiana.

In the lower court it unsuccessfully sought to obtain a perpetual injunction against the defendants to restrain them from interfering with or removing a certain pipe line, which, as alleged in the complaint, had been constructed by this company over the lands of the defendants, and which line, as

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155 180

152 364  
156 374  
152 364  
159 241

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165 241

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166 647



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the complaint averred, they were threatening to remove, etc. The issues between the parties were joined under the general denial and upon the trial the court made a special finding of facts upon which it stated its conclusions of law adversely to the plaintiff. The latter filed a motion for *venire de novo*, which was overruled. It then filed a motion for a new trial, which was also denied, and judgment was rendered against it for cost.

The assignments of error are: First, that the court erred in overruling appellant's motion to modify its special finding of facts; second, that the court erred in overruling the motion for a new trial; third, that the court erred in each of its several conclusions of law on the facts found.

The first assignment is not supported by the record, as the latter does not disclose that appellant filed a motion to modify the special finding. Therefore, this assignment must be dismissed without consideration. Aside, however, from the fact that the record does not show a motion to modify the special finding, or any action taken by the court thereon, it may be said that there is no rule of practice authorizing such motions. *Sharp v. Malia*, 124 Ind. 407; *Tewksbury v. Howard*, 138 Ind. 103.

If appellant intended to assail the action of the court in overruling the motion for a *venire de novo*, it should have properly assigned this ruling as error.

Some questions are discussed by counsel for appellant which depend upon the evidence. The bill of exceptions, however, which purports to embrace both the evidence and also the particular rulings of which appellant complains, is not in the record, for the reason that it does not affirmatively appear that the bill was filed in open court, or with the clerk, after it was signed by the trial judge.

The motion for a new trial was overruled and final judgment rendered at the February term, 1897, of the Tipton Circuit Court, and sixty days granted in which to file a bill of exceptions. What purports to be a bill of exceptions, em-

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bracing the evidence, together with matters and rulings incident thereto, appears to have been presented to the judge for his approval and signature on the 26th day of June, 1897. This bill was not signed by him until the 2nd day of August, 1897, and there is nothing whatever to show that this document was filed after it received the signature of the judge. The clerk, in his general certificate, certifies that the bill of exceptions, with the longhand manuscript of the evidence incorporated therein, was filed in his office on the 26th day of June, 1897. This is the only affirmative showing to the effect that the bill was filed. If this recital in the clerk's certificate be accepted as showing the filing of the bill, it, when construed with or applied to the statement of the trial judge in the bill itself, that he signed it on August 2, 1897, conclusively discloses that the document was filed a month, and over, prior to its becoming a bill of exceptions by receiving the judge's signature. A bill of exceptions, in order to be considered a part of the record on appeal to this court, must be shown to have been filed after it was signed by the trial judge. This is a familiar and well affirmed rule. *Makepeace v. Bronnenberg*, 146 Ind. 243; *Louisville, etc., R. Co. v. Schmidt*, 147 Ind. 638. The evidence not being in the record, we cannot consider any questions arising out of the same or depending thereon.

Among the facts disclosed by the special finding are the following: Appellees owned certain lands in Tipton county, Indiana, situated along a highway, upon which highway appellant had established and constructed gas mains. On December 20, 1897, appellant unsuccessfully endeavored to procure from appellees a right to lay and construct a two-inch pipe line over the lands in question for the purpose of conducting natural gas from a certain gas well, owned by the former, to the town of Windfall. Appellees, it seems, refused to permit appellant to lay and maintain its gas pipes over and across their lands unless it would compensate them for the right and privilege so to do, and, as it is disclosed, they

protested and objected to appellant laying its pipe lines over their lands. Appellees, as it appears, made a proposition to appellant to adjust the question as to damages, etc., but this proposition the latter refused to accept. In January, 1897, over the objections and protests of appellees, and in the absence from home of the latter, appellant, with a large force of men, entered upon these lands of appellees, and constructed over and through the same, without their permission to do so, a two-inch pipe main, for the purpose of conducting gas from one of its gas wells to the town of Windfall, in order to supply its patrons at that place. After the construction of this line over the lands of appellees, under the circumstances as stated, they (appellees) cut the line as constructed through their lands, and at the commencement of this action were threatening, it seems, to cut and remove the said pipe line from their said lands.

The court expressly finds that at no time prior to the construction of this pipe line over these lands had appellant obtained any license or secured any easement or right from appellees to construct or maintain the line over their lands. Under these facts, the court certainly was justified in stating its conclusions of law adversely to appellant, and thereby denying its right to an injunction to prevent appellees from removing from their lands the gas main which has been, as the facts disclose, unlawfully placed thereon by appellant. The latter is shown to have been a wrongdoer in locating and constructing the gas main in question upon and over appellees' lands, and it certainly is not entitled to equitable relief to enable it to continue the wrong which it originally perpetrated. The facts reveal, as heretofore said, that appellant had no license, easement, or color of right whatever to locate and maintain its mains on and over appellees' lands. Clearly, therefore, under the facts, there is no foundation whatever upon which appellant can base its right to the extraordinary remedy of injunction.

If, under the facts found by the court, appellant has any

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City of Huntington v. Force.

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right of action against appellees, it is manifestly not one which can be entertained by a court of equity. There is no error in the court's conclusions of law upon the special finding, and the judgment is therefore affirmed.

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## THE CITY OF HUNTINGTON v. FORCE ET AL.

[No. 18,130. Filed April 4, 1899.]

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164 820

**MUNICIPAL CORPORATIONS.—***When City Becomes Liable on Contracts for Public Improvements.—Statute Construed.*—Under the act of March 8, 1889, known as the "Barrett Law," a city is not liable on contracts for the construction of certain public sewers until it has issued and sold improvement bonds, collected assessments, or otherwise realized from the property benefited the amounts to be paid out to the contractors. *p. 370.*

**SAME.—Improvements.—Complaint by Contractor for Extras.—Sufficiency.**—A complaint for extra work and materials by one who contracted with the city to make certain public improvements, which does not show that the extra work and materials were performed and furnished upon orders in writing signed by the engineer and approved by the common council, as required by the terms of the contract, is bad on demurrer. *pp. 370, 371.*

**SAME.—Improvements.—Liability of City.**—A city cannot render itself liable for work done, and materials furnished, "beyond the contract," in the construction of improvements which were to be paid for by assessments on the lots and lands to be benefited. *p. 371.*

From the Whitley Circuit Court. *Reversed.*

J. B. Kenner and U. S. Lesh, for appellant.

George D. Parks, for appellees.

**DOWLING, J.**—Appellees sued the city of Huntington for moneys alleged to be due them on account of work done, and materials furnished, in the construction of certain public sewers. The complaint is in three paragraphs, the *first* and *third* being founded upon written agreements, plans and specifications, which are made exhibits. The *second* paragraph is a common count for work and materials not called for by the contract, plans, or specifications, but alleged to have been performed, and furnished upon the order of the city engineer,

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or his authorized agents. Demurrers were filed to the several paragraphs of the complaint and were overruled. Appellee answered in five paragraphs, and filed a counterclaim for damages. Reply in four paragraphs. Demurrer to second paragraph of reply overruled. Trial by jury. Special verdict returned, and judgment for appellees. Exceptions to the rulings of the court were saved, and error is properly assigned upon these rulings.

The sewers which the appellees undertook to construct constituted a part of the general system of public improvements of the city of Huntington, and the contracts for their construction were entered into upon the authority of the act of March 8, 1889, known as the "Barrett Law."

The copy of the contract filed with the first paragraph of the complaint contains an agreement on the part of the appellant "to allow and pay in cash" to appellees the prices set out in the contract; and the copy of the agreement, filed with the third paragraph, states that the appellant "promises to allow" to the appellees the prices named, "payment to be made after work is completed and bonds sold."

There is no averment in either of these paragraphs that the improvement bonds had been sold, or that a fund had come into the possession of the city of Huntington out of which the claim of the appellees could be paid.

The action is brought against the city as if it were primarily and unconditionally liable for the claims of the appellees.

According to the construction put upon the act of March 8, 1889, by this court, no such primary liability exists, or can be enforced against the city.

Notwithstanding the words of the statute to the effect that the city shall be liable to the contractors for the contract price of the improvement, it is held that the city, in its corporate capacity, assumes no obligation to pay for the work. The resolutions of the common council, preliminary to the

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making of the contracts for the improvements, could only be such as the statute authorized; and the contracts made in pursuance of those resolutions could not charge the city with a liability not contemplated by the resolutions. The statute required that the cost of the improvements should be assessed against the lots and lands benefited thereby. It permitted the issuing of bonds in anticipation of assessments against the property benefited; but it neither required nor authorized the city to pay the cost of such improvements out of its general revenues.

The contract referred to in the first paragraph of the complaint must be understood to mean that the city of Huntington will pay the claim of the contractors in cash when a fund is collected out of which such payment can lawfully be made. The agreement set out in the third paragraph of the complaint expressly declares that "payment is to be made after work is completed and bonds sold."

The liability of the appellant being secondary, it could not accrue until appellant had issued and sold improvement bonds, collected assessments, or otherwise realized from the property benefited the amounts to be paid out to the contractors. *Quill v. City of Indianapolis*, 124 Ind. 292; *Robinson v. City of Valparaiso*, 136 Ind. 616; *Dowell v. Talbot Paving Co.*, 138 Ind. 675; *Porter v. City of Tipton*, 141 Ind. 347.

The proceedings in the case of the *City of Elkhart v. Wickwire*, 121 Ind. 331, cited by counsel for appellees, were under a different statute, and that case is not an authority in the present controversy.

It is further objected by appellant that the first and third paragraphs of the complaint are bad, because they do not show that the extra work and materials were performed and furnished upon orders in writing, signed by the contractor and engineer and approved by the common council, as required by the terms of the contracts, and the specifications attached thereto. This objection is well founded. We find

**Lackey v. Boruff.**

nothing in the contracts which conferred on the city engineer authority to alter the plans and specifications without the approval of the common council.

The demurrers to the first and third paragraphs of the complaint should have been sustained.

The second paragraph of the complaint, also, must be held insufficient. We have not been referred to any statute, and we know of none, which authorized the appellant to render itself responsible for work done, and materials furnished "beyond the contract" in the construction of sewers, which were to be paid for by assessments on the lots and lands to be benefited.

Other errors are assigned, but as the judgment must be reversed upon the pleadings, it will not be necessary to consider them.

Judgment reversed, with instructions to the court to sustain the demurrers to the first, second, and third paragraphs of the complaint.

**LACKEY v. BORUFF ET AL.**

[No. 18,618. Filed April 4, 1899.]

**HUSBAND AND WIFE.—Principal and Surety.—Bills and Notes.—**

**Married Women.**—A note executed by a husband and wife in renewal of a note for money loaned the wife and used by the husband, executed prior to the act of 1881 (sections 6960-6970 Burns 1894), enlarging the rights of married women, is a valid and binding obligation of the husband, although void as to the wife, whether he executed the same as principal or only as surety for his wife. *pp. 372-375.*

**PRINCIPAL AND SURETY.—Bills and Notes.**—The relation of suretyship is fixed by the arrangement and equities between the debtors, and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements between the parties, ought to pay the debt. *p. 376.*

**SAME.—Husband and Wife.—Bills and Notes.**—Where a husband and wife executed a note for money loaned the wife, and used by the husband, the husband is the principal, and the wife the surety. *p. 376.*

**SAME.—Bills and Notes.—Consideration.—Husband and Wife.**—A note signed by a wife with her husband in renewal of a note for money

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152	371
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159	431

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loaned the wife and used by the husband, executed prior to the act of 1881 (sections 6960-6970, Burns 1894) enlarging the rights of married women, is not without consideration as to the wife, although the original note was void as to her, as the consideration moving to the husband was sufficient to support said note against all who executed the note with him. *pp. 376, 377.*

**BILLS AND NOTES.**—*Consideration.*—*Mortgages.*—The consideration sustaining a note is sufficient to sustain a mortgage securing the same which was executed contemporaneously with the note, and as a part of the same transaction. *p. 377.*

**PRINCIPAL AND SURETY.**—*Married Women.*—*Contracts of Suretyship.*—*How Avoided.*—Contracts of suretyship entered into by a married woman are voidable, not void, and can only be avoided by such married woman and her privies in blood, representation, or estate. *pp. 377, 378.*

**SAME.**—*Husband and Wife.*—*Married Women.*—*Contracts of Suretyship.*—*Bills and Notes.*—A husband and wife executed a note prior to the passage of the act of 1881 enlarging the rights of married women, for money loaned the wife, and used by the husband. The note was renewed in 1881, and again in 1896, and secured by a mortgage on the wife's separate real estate. Plaintiffs, judgment creditors of the wife, brought suit to set aside the mortgage as fraudulent. *Held*, that the original note was void as to the wife, but valid as to the husband; that in the execution of the renewal note and mortgage the contract as to the wife was one of suretyship; that the note was not without consideration as to her, since the consideration moving to the husband was sufficient to support the note against the surety; that while the note and mortgage might be voidable as to such surety on the ground of coverture, it was valid as to plaintiffs. *pp. 378-378.*

From the Lawrence Circuit Court. *Reversed.*

*E. K. Dye* and *Emerson Short*, for appellant.

*James E. Boruff*, *Newton Crooke* and *McHenry Owen*, for appellees.

**MONKS, C. J.**—This action was brought by appellees Boruff, Crooke, and Owen, against their co-appellees and appellant to set aside a fraudulent conveyance of real estate by appellees Wesley S. and Clementine Armstrong to appellee Opal Armstrong, and a mortgage executed by the same parties to appellant.



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appellees Wesley S., Clementine and Opal Armstrong, plaintiffs in the court below, were defaulted. The cause tried by the court, a special finding of the facts made, conclusions of law stated thereon against appellant, to of which she excepted, and final judgment rendered set-aside her mortgage and the deed to Opal Armstrong, and the real estate be sold free from the lien of said mortgage, to pay the judgment in favor of the plaintiffs below, mentioned in their complaint. The errors assigned call in question each conclusion of law.

The special finding, so far as necessary to determine the questions presented, is substantially as follows: In May, 1877, appellees Crooke and Owens recovered judgment in Lawrence Circuit Court against appellee Clementine Armstrong for \$300, and on the same day appellee Boruff recovered judgment against her for \$500. The debts for which said judgments were rendered were incurred by said Clementine in 1893. That on and prior to February, 1896, said Clementine was the owner in fee simple of the real estate described in the complaint. Appellant loaned Clementine Armstrong \$325 in 1869 and \$200 in 1879, for which said Clementine and her husband Wesley S. Armstrong, executed their notes drawing interest at the rate of ten per cent. per annum. Said notes were renewed in 1881 by the Armstrongs and the original notes taken up. On March 30, 1896, said Armstrongs executed a note to appellant for \$2,000 in renewal of the principal and interest of said notes, which were the only consideration therefor; and for the purpose of securing the last mentioned note executed a mortgage on the real estate in controversy to appellant, which mortgage was duly recorded April 9, 1896. On October 7, 1896, said Clementine and Wesley S. Armstrong executed to Opal Armstrong, their grandson, a deed for the real estate in controversy, for which no money or other valuable consideration was paid. The grantee in said deed did not take possession thereunder, but the grantors remained in possession of said

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real estate until the trial of this cause. After the execution of said mortgage said Clementine Armstrong had no property subject to execution except said real estate, and after the execution of said deed she had no property subject to execution. Said Clementine Armstrong has been since 1847 a married woman, the wife of her co-appellee, Wesley S. Armstrong. Said notes, deed and mortgage were all executed in Lawrence county, Indiana. The special finding states that Wesley S. Armstrong signed the notes executed in 1869, 1879, and 1881 as surety for his wife, but it is also found that the money loaned by appellant was used by him. It is not stated in the finding whether he signed the \$2,000 note executed in 1896 as principal or surety.

The court stated as conclusions of law: (1) That the notes given by Clementine Armstrong to appellant were void; (2) that the notes being void, there was no consideration for said note and mortgage given to appellant; (3) that said note and mortgage, being without any consideration, are fraudulent and void as to appellees Boruff, Crooke, and Owen.

Appellant insists that under the law prior to 1881, in force when the original notes were executed, and at all times since, coverture was a personal defense, which is not available unless pleaded, and the party may plead or not, as she sees fit; but such defense is only available to her and her privies in blood, representation, or estate, citing *Aetna Ins. Co. v. Baker*, 71 Ind. 102, 113, 114; *Bennett v. Mattingly*, 110 Ind. 197, 200, 202; *Crooks, Aud., v. Kennett*, 111 Ind. 347, 349; *Ellis v. Baker*, 116 Ind. 408, 411, 412; *Miller, Ex., v. Shields*, 124 Ind. 166; *Johnson v. Jouchert*, 124 Ind. 105; *Plaut v. Storey*, 131 Ind. 46, 51. See 10 Enc. of Pl. & Pr. 270, 272. That Mrs. Armstrong has not plead her coverture as against appellant's note and mortgage, or otherwise sought to avoid the same, and appellees Boruff, Crooke, and Owen cannot do so, because they are neither her privies in blood, representation, or estate. Appellees Boruff, Crooke, and Owen admit the rule to be as stated since September 19,

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When the act enlarging the rights of married women act, sections 6960, 6970 Burns 1894, sections 5115, corner 1897, but insist that prior to that date the contract of married women, except as to her separate estate, wholly and absolutely void; and third persons not privy to the contract, representation or estate could take advantage of that the original notes executed by Mrs. Armstrong in 1879 and 1879 were absolutely void, and for this reason the mortgage executed by her, after the rights of married women were enlarged, were without any consideration.

Clear from the facts found that the notes executed in 1879, 1881, and the note for \$2,000 executed in 1896, by Mrs. Armstrong and her husband, were valid and binding obligations of the husband, even if the same were void as to her, and she could have successfully pleaded her coverture as a defense thereto. This is true whether he was the principal or only the surety of his wife on the notes. *Davis v. Statts*, 43 Ind. 103, and authorities quoted in *Brandt on Suretyship*, section 153. It is equally true, as declared by said appellees Boruff, Crooke, and Owen, that the law as declared by this court, said original notes, if executed prior to the act of 1881, as to Mrs. Armstrong, were void; and if, after their execution, she had been a *feme sole* by divorce, or by the death of her husband, any contract made by her to pay said notes, or any new contract executed by her in consideration of her liability on the original notes, would have been without consideration; and she could only be bound by a new contract based upon a new and sufficient consideration, the same as if she had never executed the original notes. *Maher v. Martin*, 43 Ind. 314, and cases cited; *Putnam v. Tennyson*, 50 Ind. 456; *St. v. Passage*, 54 Ind. 106; *Long v. Brown*, 66 Ind. 62; *Austin v. Davis*, 128 Ind. 472, 477; *Keadle v. Siddens*, 5 Ind. App. 8, 13, and cases cited; *Tifftersons & Dom. Rel.* section 62; *Clark on Cont.* pp.

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202, 203, and cases cited in note 174. The rule would be the same regardless of whether such contract or note, given in consideration of her liability on said original notes, was executed before or after the taking effect of the act of 1881, enlarging the rights of married women. It does not follow, however, that the note for \$2,000 and the mortgage securing the same were executed by her without consideration. Her liability on said note and mortgage is, as we have heretofore stated, to be tested by the same rules as if she had never signed the original notes or been a party thereto. The contract of Mrs. Armstrong in the execution of the \$2,000 note and the mortgage securing the same was either that of principal or surety. The relation of suretyship is fixed by the arrangement and equities between the debtors, and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements between the parties, ought to pay the debt. *Porter v. Waltz*, 108 Ind. 40, 42; *Sefton v. Hargett*, 113 Ind. 592, 595; *Vogel v. Leichner*, 102 Ind. 55, 60, 61, and cases cited; *Noland v. State, ex. rel.*, 115 Ind. 529, 552; *McCoy v. Barns*, 136 Ind. 378, 381, and cases cited; *Johnson v. Jouchert*, 124 Ind. 105, 108.

In *Vogel v. Leichner*, 102 Ind. 55, p. 60, this court said: "That the husband and wife both appeared on the face of the papers to be principals, or that the parties dealt on the basis that both were principals, is of no consequence; the wife had no power to deal as principal if in fact she was surety. Whether she was principal or surety will be determined not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive either in person or in benefit to her estate, or did she so receive, the consideration upon which the contract rests?" Tested by this rule, the contract of Mrs. Armstrong in the execution of said note and mortgage was one of suretyship. The consideration for the note for \$2,000, executed in 1896, was the principal and interest of the notes executed in 1881 in renewal of the original notes, which consideration was suf-

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to support said note as against the husband; and, Mrs. Armstrong having signed said note at the time of its execution was not without consideration as to her, for the reason that the consideration moving to the husband was sufficient to support said note against all who executed the note. *n. Eppert v. Hall*, 133 Ind. 417, 419. As the mortgage was executed contemporaneously with the note and as a part of the same transaction, the consideration sustaining the note was sufficient to sustain the mortgage. *Davidson v. Davidson*, 1 Ind. 224, 227, 228, and authorities cited; *Henderson v. Rice*, 1 Coldw. (Tenn.) 223. The right to defend against said note and mortgage, or to avoid the same, on the ground of her coverture, depends, therefore, upon the law in force when the same was executed.

It is not necessary, therefore, to determine whether or not the liability of a married woman, executed prior to the act of 1881, could be avoided by third persons on the ground of her coverture, as insisted by appellees Boruff, Cooke, and Owen, or whether that right was confined to her and her privies in interest in the property represented, and estate. Since said act of 1881 entered into effect, the rights of married women took effect, their right to contract is the same as if unmarried, except as prohibited by said act. *Miller, Ex., v. Shields*, 124 Ind. 166, and authorities cited; *Haynes v. Nowlin*, 129 Ind. 581, 585, and cases cited; *Vogel v. Leichner*, 102 Ind. 55, 58, 59. It is provided in section 6964 Burns 1894, section 5119 Horsing section 4 of the act of 1881, that "a married woman shall not enter into any contract of suretyship, whether as guarantor, or in any other manner; and such contract shall be void." It is only by virtue of said section that the coverture of Mrs. Armstrong can be set up to avoid said note and mortgage. It has been uniformly held by this court since said section took effect that contracts of suretyship made by married women are voidable, not void; that coverture is a personal defense; and therefore such contracts can only be avoided by such married woman, and her

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privies in blood, or representation. *Plaut v. Storey*, 131 Ind. 46, 51, and cases cited; *Johnson v. Jouchert*, 124 Ind. 105; *Bennett v. Mattingly*, 110 Ind. 197, 199, 203, and cases cited; *Heal v. Niagara Oil Co.*, 150 Ind. 483, 485. Privies in estate of a married woman may also, under certain circumstances, avoid her contracts of suretyship. *Johnson v. Jouchert*, *supra*, pp. 111-113, and authorities cited; *Crooks v. Kennett*, 111 Ind. 347, and cases cited. Appellees Boruff, Crooke, and Owen are neither privies in blood, representation, nor estate of Mrs. Armstrong, and therefore cannot avail themselves of the defense of coverture given her by statute to avoid said mortgage. *Plaut v. Storey*, *supra*, p. 51.

It follows from what we have said and the authorities cited, (1) That the original notes, while void as to Mrs. Armstrong, were valid and binding upon her husband. (2) That the note for \$2,000 and the mortgage securing the same, were not given without any consideration, but were given for a consideration sufficient to support the same as against Mrs. Armstrong and her husband. (3) That, while said note and mortgage may be voidable by Mrs. Armstrong on the ground of coverture, said appellees Boruff, Crooke and Owen are not in a position to take advantage of her coverture, and said note and mortgage are, therefore, valid as to them, they being third parties thereto. The court erred, therefore, in its conclusions of law.

The judgment setting aside appellant's mortgage and ordering the sale of said real estate free from the lien thereof, is therefore reversed, with instructions to the court below to restate its conclusions of law in accordance with this opinion, and render judgment in favor of appellant accordingly, and that said real estate be sold subject to the lien of appellant's mortgage.

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ISLAND COAL COMPANY v. COMBS ET AL.

[No. 18,566. Filed April 5, 1899.]

**TITLE.—Right to Sue.—Special Finding.**—A finding that been the owner in fee of the lands in controversy, and had ad such lands to C., and that C. had died, leaving plaintiffs y heirs at law, is sufficient to support an action to quiet title one who claims title through F. pp. 380-386.

**Right to Sue.—Lease.**—A suit to quiet title may be maintained one who claims title under a lease from the grantor of plain- ancestor. pp. 386, 386.

**D AND TENANT.—Lease for Coal Mining Purposes.—Implied ions to Begin Mining Within a Reasonable Time.**—Where in of lands for coal purposes the lessee agrees to pay to the t royalty or rent, which depends on the amount of coal the lessee thereby, in the absence of any provisions to the y, impliedly obligates himself to begin the mining of the coal a reasonable time after the execution of the lease. p. 387.

**Lease for Coal Mining Purposes.—Forfeiture.**—A provision se of lands for coal purposes, under penalty of forfeiture, thin a specified time the necessary work for developing the terests in the lands leased, by opening shafts so that the ung coal may be removed and transported to market, requires e mining of coal should be commenced within the time speci- d that the construction and equipment of shafts is not a nt compliance with the terms of the lease so as to prevent a ire. pp. 388, 389.

**Breach of Condition in Lease.—Forfeiture.—Demand.**— :—A provision in a lease, that the lessors, upon the violation rtain condition therein, may, without demand, notice or act, the premises, is an express waiver upon the part of the f all demand or notice upon a breach of the condition of ire. pp. 390, 391.

**Breach of Condition in Lease.—Forfeiture.—Demand.**— the owner of leased premises is in possession, such owner is uired to make demand for possession on a forfeiture of the p. 391.

**Breach of Condition of Lease.—Acquiescence of Lessor.**— :—Mere acquiescence of the lessor is not to be construed as ar of a breach of a condition of forfeiture. p. 391.

the Daviess Circuit Court. *Affirmed.*

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*Charles E. Barrett, Gardiner & Gardiner, B. K. Elliott and W. F. Elliott, for appellant.*

*H. W. Letsinger, Davis & Moffett, Bilheimer & Downey, T. J. Terhune and S. R. Artman, for appellees.*

JORDAN, J.—This action was commenced on the 27th day of February, 1896, by the appellees, in the Greene Circuit Court, to quiet title to certain described real estate, upon which appellant, it appears, claimed to hold a coal lease for a period of ninety-nine years, beginning November 10, 1883. The complaint is in the ordinary and general form, and, after alleging that the plaintiffs are the owners in fee simple, as tenants in common, of the land described therein, it is further averred that the defendant is asserting an unfounded interest or right in and to said lands, which is adverse to plaintiffs' claim and title, and that said asserted claim or right casts a cloud upon plaintiffs' title, etc.

The issues were joined between the parties and, on motion, the cause was venued to the Daviess Circuit Court. Upon the trial the court found the facts specially and stated its conclusions of law thereon in favor of appellees, and, over appellant's motion for a new trial, rendered judgment quieting the title of appellees in and to the real estate described in the complaint. The material questions arise upon the court's conclusions of law upon the special finding. Omitting the formal parts of this finding, the following facts are thereby disclosed:

First. On November 10, 1883, Mary A. Fainot, of Greene county, Indiana, was the owner in fee simple, and in possession, of the real estate in controversy.

Second. On that day, she, together with her husband, executed to Samuel N. Yeoman, of Fayette county, Ohio, a certain lease. Omitting the formal parts, and some other provisions thereof not material in any way to the questions herein involved, said lease may be read as follows: "That said parties of the first part, in consideration of the rents, roy-



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and covenants hereinafter contained, and by the said second part and his assigns to be paid and performed hereby grant, demise, and lease to the said party second part, his executors, administrators, and assigns, to mine all the mineral, stone, coal, the minerals and underlying the surface of the following described premises: Situate in the township of Stockton, in the county of Greene, in the State of Indiana, viz: Being the north part of the southwest quarter of section 25, containing 36 acres, more or less, and the north part of the northwest quarter of the northwest quarter of section 36, containing 18 acres, in town 7 north, of range 7 west, (and other lands) with so much of the surface of said above described premises as may be necessary for the opening of a mine for the purpose of mining, removing and disposing of the coal, and maintaining the necessary buildings \* \* \* and other \* \* \* appurtenances as may be necessary and convenient in the prosecution of the business of mining and trafficking in coal. To have and hold the premises in the manner and form as aforesaid, with the appurtenances unto the said Samuel N. Yeoman, his executors, administrators and assigns from the 10th day of November, 1898, and during the full term of ninety-nine years next ensuing, and fully to be completed and ended, yielding and paying quarterly therefor during the said term, a royalty of \$1.00 per ton for each and every ton of merchantable coal that may be mined or removed from said premises. And, however, that if said royalty (rent) or any part thereof shall remain unpaid for one year after it shall become due the same shall become due on the 15th day of the month succeeding the end of the quarter after the coal is mined and with demand made therefor, or if the said Samuel Yeoman shall fail within one year from the date of this lease to cause to be constructed a standard gauge railroad from the Indianapolis and Vincennes railroad to the town of Stockton to within one-half mile distance of the coal

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mine of John F. Griffin, now located and in operation in said Stockton township, county of Greene, State of Indiana, or shall fail for eighteen months from the date hereof to commence the necessary work for developing the coal interest herein leased by opening coal shafts on the above leased premises or upon other and adjacent premises which he has in like manner leased, by, through or from which said coal underlying said premises can be mined or removed, or mines so to be opened as aforesaid, so that the coal underlying said premises may be mined, removed and transported to market, or shall mine the coal within one hundred lineal feet of the dwelling house upon said premises, it shall be lawful for said lessors, their heirs or assigns, without further notice, demand or act, unto said premises to re-enter, and the same to have again, repossess and enjoy as in their first and former estate; and thereupon this lease and the terms thereof and everything therein contained on the said lessors' behalf to be done and performed shall cease, determine and be utterly void. [Our italics.] \* \* \* And said lessee for himself, his executors, administrators and assigns, doth covenant and agree with the said lessors, their heirs and assigns as follows: That said lessee will pay said royalty in manner aforesaid; that he will construct or cause to be constructed the railroad as aforesaid in the manner, time, and location, as aforesaid; that he will commence the development of the coal underlying the said premises in manner and form within the time aforesaid. \* \* \* And the said lessors for themselves and their heirs, executors, administrators and assigns covenant and agree with the said lessee, his executors, administrators and assigns that the said lessee, paying the royalty and keeping the covenants of this lease on his part to be kept shall lawfully and quietly occupy and enjoy said premises, in manner and form for the purposes herein written or intended to be written, during said term, without any molestation by said lessors, or their heirs or any person or persons claiming under them. \* \* \* It is mutually agreed and understood be-

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the parties of the first and second parts that the local construction of a standard gauge railroad within the 1 on the route herein set forth shall be deemed and a fulfilment of the conditions and covenants of Samuel Yeoman to construct and secure the construction of a

And the parties of the first part further covenant with said party of the second part, his heirs, executors and assigns that if at any time within 1 months from this date the said party of the second 3 executors, administrators or assigns, shall pay to the 5 ties of the first part, their heirs or assigns, the sum per acre for the premises herein described, then the 7 ties of the first part bind themselves and their heirs 9 ns by these presents with the said party of the second at they will make to him, his heirs, executors, adminis- and assigns a good and sufficient general warranty or the premises herein described, and will deliver pos- of said premises to the said party of the second part, 3 cutors, administrators or assigns upon the payment of rchase money herein named."

d. That said instrument was duly acknowledged and ed in the recorder's office of Greene county, Indiana.

10th. That on the 21st day of January, 1885, said Sam-

Yeoman, by deed of conveyance duly acknowledged rded in the recorder's office of said county, con- all his right, title and interest to numerous tracts of 2 upon which he had acquired coal leases, in Greene 4 , Indiana, to the defendant, which deed of convey- contained the description of real estate contained in said 6 ment in writing above set out, and by said description 8 ted to convey the interest of said Samuel N. Yeoman l lands to the defendant.

12th. That on March 31, 1885, said Mary A. Fainot and ad conveyed to Margaret Combs the lands described in 2 complaint, "in which deed of conveyance it was stipu- that the same was made subject to a certain coal lease

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and option of purchase for \$35 per acre, held by the said Samuel N. Yeoman on said lands."

Sixth. That on the 6th day of August, 1890, said Margaret Combs died intestate in Greene county, Indiana, leaving plaintiffs herein as her only heirs at law, and seized in fee simple and in possession of the real estate described in plaintiffs' complaint.

Seventh. That in the months of January, February, and March, 1890, the defendants mined not less than 100 tons of coal from the lands described in the complaint herein, the royalty upon which amounted to \$10; that payment for the same has not been made.

Eighth. That the coal so mined by defendant was so mined without the knowledge of defendant's officers, directors, and employes; that the same was being mined from the plaintiffs' land, but with the belief that said coal was being mined from lands of defendant adjacent to said lands of plaintiffs, and that, as soon as said mistake was discovered, defendant ordered its employes to cease mining under plaintiffs' lands, and that, aside from the coal so mined by mistake, the defendant had never mined any coal from plaintiffs' land.

Ninth. That, in less than one year from the execution of said writing above set out, defendant caused to be constructed the railroad mentioned therein, from the I. & V. railroad to within one-half mile of John V. Griffin's mine, into Stockton township, Greene county, and excavated and constructed a shaft, and built a tipple, and supplied the necessary machinery for mining coal and equipping a coal mine on lands adjoining the lands of the plaintiffs, the right of possession of which lands at said time was held by the defendant under a verbal contract with the owner of said lands, etc.

Tenth. That there is and has been continuously a highway on the line between the lands of the plaintiffs and the lands on which the defendant's mines are constructed.

Eleventh. That neither at the time of the execution of

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e by Eugene Fainot and Mary A. Fainot to Samuel  
1, nor at any time thereafter, did either the said Eu-

Mary A. Fainot own, or have any interest in, any  
tuated in either the southwest quarter of the south-  
arter of section twenty-five, in township seven north,  
e seven west, or in the northwest quarter of the north-  
arter of section thirty-six, said township and range,  
an the lands described in the complaint.

fth. That said Eugene Fainot and Mary A. Fainot  
xecuted any other lease to said Samuel N. Yeoman  
at set out in finding number two herein.

teenth. That defendant or its predecessors did not  
he development or mining of coal from said lands  
eighteen months from the time of the execution of  
se, nor has such development or mining of coal been  
begun yet.

contended by the learned counsel for appellant that  
cial finding is not sufficient to support the judgment  
following reasons: First. There is no finding that  
es had any title whatever to the lands in dispute, or  
ntitled to the possession thereof; second, there is no  
that appellant is asserting a claim to the premises ad-  
o appellees; third, it is not found that the description  
land, as contained in the lease, does not fully identify  
d; fourth, there is no finding that appellant abandoned  
rk of mining coal, and that he forfeited the lease;  
he finding does not disclose that any demand for roy-  
as made or that the work should proceed more rapidly.  
espect to the first of the above objections, it may be  
at by the provisions of section 1070 R. S. 1881, sec-  
082 Burns 1894, section 1070 Horner 1897, the  
of real estate, in or out of possession, may maintain an  
to quiet his title thereto.

the first finding it is shown that Mrs. Fainot, on No-  
r 10, 1883, was the owner in fee simple and in posses-  
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sion of the real estate in controversy. In March, 1885, it appears that she and her husband conveyed this land to Margaret Combs, who in August, 1890, died intestate at Greene county, Indiana, the owner in fee and in possession of said premises, leaving appellees surviving her as her only heirs at law. As both parties in this case claim through a common grantor, these facts at least are *prima facie* sufficient to establish that appellees, at the time they commenced this action, owned and held in fee the land in question by descent, as tenants in common.

In regard to the second objection urged against the special finding, it may be said that it does disclose that appellant, when challenged by appellees' complaint to assert its claim or title to the land, did so by setting up the lease set out in the finding. This instrument, which, as it appears, was to operate for ninety-nine years, was duly recorded in the recorder's office of Greene county, Indiana, wherein the land is situated. These facts certainly establish that the right or title, which appellant asserted under this lease was adverse to appellees, and if, for any sufficient reason, the lease is shown to be invalid or ineffective, it, under the circumstances, would serve to cast a cloud upon appellees' title, and an action to quiet their title and free the same from such an unfounded claim could be maintained. *Cuthrell v. Cuthrell*, 101 Ind. 375; *Woodward v. Mitchell*, 140 Ind. 406. It must follow, therefore, that appellant's second objection is not tenable.

The fourth and fifth contentions will be considered together. Appellees' learned counsel contend that the judgment of the lower court can and ought to be sustained upon all or either of the following grounds: First, that the description of the leased premises is so uncertain as to render it void; second, that the provisions of the lease imply that the lessee shall, within a reasonable time, begin to mine the coal underlying said premises, and that a failure of the lessees to do so will result in a forfeiture of his rights; third, that the

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found by the court and established by the evidence, it appellant had violated an express condition of the lease and therefore, by virtue of its express stipulation, forfeited all of its rights, and that the lease, so far as appellant is concerned, had been rendered null and void.

In our opinion, at least the third contention of appellees' must be sustained; and, as this will result in an affirmance of the judgment, consequently we may dismiss the appeal relative to the sufficiency of the description of the land contained in the lease. It is true that the court does not expressly find, *in haec verba*, that appellant abandoned the lease required to be performed by the lease; but facts sufficiently, however, are shown to justify the conclusion that, from the beginning of this action, appellant's rights under the lease, by virtue of its having violated the terms or conditions thereof, had ceased or terminated, and that it was estopped thereby from setting up the lease against appellees.

The rule asserted by counsel for appellees relative to an abandonment of leases of this character is well supported by the authorities. In leases of mineral lands, of the nature of the one in question, where the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby, in the absence of any provision to the contrary, impliedly obligates himself to develop the coal, and the mining thereof, within a reasonable time after the execution of the lease. As to what may be regarded as a reasonable time, however, depends upon the circumstances of the particular case. Where the royalty to be paid to the lessor is a royalty measured by so much per ton of the product mined, the authorities affirm that it is not within the option or discretion of the lessee to delay in developing and operating the mines upon the leased premises for an indefinite or unreasonable time. A failure upon the part of the lessee, for an unreasonable length of time, to carry into effect the purposes of such a lease by opening and working the mines underlying the leased premises, will be

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held to operate as a forfeiture of his rights. The reason for the rule is obvious. *Conrad v. Morehead*, 89 N. C. 31; *Maxwell v. Todd*, 112 N. C. 677, 16 S. E. 926; *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. 303, and cases there cited; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Kleppner v. Lemon*, (Pa.) 35 Atl. 109, 38 Weekly Notes of Cases 388; *Sharp v. Wright*, 28 Beav. 150.

In this appeal, however, the parties thereto saw proper to provide therein, among others, an express condition, the violation or breach of which upon the part of the lessee was to result in terminating his rights. This condition is embraced in that part of the proviso in the lease which we have emphasized by italics. The substance of this condition is that in the event of the failure or neglect, for a period of eighteen months after the date of the lease (November 10, 1883), upon the part of the lessee, to begin work on the lands, and develop the coal interest leased, by opening shafts or mines on said lands, or upon adjacent premises, "by, through, or from which" the underlying coal could be mined and removed, etc., it should be lawful for the lessors, their heirs or assigns, without further demand, notice, or act, into said premises to reënter, etc.; and thereupon the lease was to cease or terminate and be "utterly void."

Counsel for appellees say: "We concede that this provision does not require that a coal shaft or mine must be erected on this land. To erect it on adjacent lands would be sufficient so far as concerns the mere erection of the shaft." They assert, however, that by the express terms of the condition in question, it must be a mine or shaft through or from which the underlying coal of the leased premises can be mined and removed. We concur in this contention. It is true that by the eighth finding it is shown that in less than one year after the date of the lease the railroad mentioned therein was built as required, and that the defendant constructed a shaft and equipped a coal mine on lands held by it under a verbal contract, which lands, as the finding states, were adjacent to the



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in controversy. But it is certainly evident that the steps of appellant, alone, were not a full compliance with the requirements of the condition as imposed by the lease. The mere erection and equipment of the shaft or mine, within the stipulated period, upon either the leased lands or adjacent thereto, by which the coal underlying the lands could be mined and removed, manifestly cannot be held to bring the lessee fully within the requirements of the lease. If it could be, then appellant, having taken these steps, might cease to proceed further in the matter of developing or mining coal upon the leased premises, and be at liberty to do so, and thereby deprive the lessor, for an indefinite time, of his royalty or rent as fixed by the terms of the lease. The instrument in question cannot, therefore, be interpreted or held only to require the lessee to use the means for developing the coal under the lands in controversy, and then fail or neglect, thereafter, for a period of three years, to employ such means for the purpose in-

controversy. Appellant, as it appears, through mistake, in the year 1891, mined from these premises about 100 tons of coal, but, when the mistake was discovered, it directed its agent to cease mining the coal from these lands; and the exception of the coal so mined through mistake, together with its predecessor or assignor, has been enjoined, from the time of the execution of the lease to the filing of this action, covering a period of time in excess of twelve years, to begin the development or mining of the coal from the premises in controversy.

Clearly contemplated, we think, by the parties to the lease, the question, as disclosed by the light of its own provisions, is that the development of the coal interest should be actually begun in good faith by the lessee within eighteen months of the time the lease was executed, and that a violation of this condition, as expressly stipulated, should operate to render the lease null and void, to the extent, at least, that all of

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appellant's rights thereunder would be extinguished. In the case of *Woodward v. Mitchell*, 140 Ind. 406, a lease granting the right to mine coal, stone, etc., for a term of years, was involved. The lessor under that lease was to receive a certain part of the net profits arising from the output of the mines; and it was further provided therein that, if the enterprise should be abandoned for twelve months, it should cease and become null and void. No time was fixed by the lease when the work of mining the coal or stone was to begin. This court held in that case that the failure to commence such mining operations within twelve months after the term of the lease began operated as a forfeiture of the lessee's rights thereunder. That appellant is shown, by the facts found by the court, to have wholly failed to comply with the express requirements of the condition imposed by the lease, there can be no doubt. That such failure, *ipso facto*, at the option of the lessor, or those claiming through her, as her heirs or assigns, rendered the lease null and void, so far, at least, as the rights of appellant thereunder are concerned, and that it is estopped or debarred from setting up the lease as against appellees, are well affirmed propositions. *Wills v. Manufacturers, etc., Co.*, 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603, and cases cited; *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, and authorities there cited; 2 Taylor's Land. and Ten. (8th ed.) section 492, and cases cited in foot note 3 on page 76. It cannot be successfully controverted but what appellees, under the circumstances, were authorized to enforce the forfeiture; they being heirs of Mrs. Combs, to whom the leased premises were conveyed by the lessor. Section 5218 R. S. 1881, section 7099 Burns 1894, section 5218 Horner 1897; *Swope v. Hopkins*, 119 Ind. 125; 12 Am. and Eng. Enc. of Law, p. 1035, clause 13; *Maxwell v. Todd*, 112 N. C. 677.

It is insisted by counsel for appellant that, if a forfeiture actually resulted by reason of the violation or breach of the condition in question, the same must be deemed to have been

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as no steps appear to have been taken upon the part of appellees to reënter the premises, by a demand or otherwise, and that no demand has been made upon appellant, or given to it, requiring it to comply with the conditions of the lease. In answer to this, it may be said that the lease expressly provides that the lessors, their heirs or assigns, upon the violation of the condition in question, may, at demand, notice or act, reënter the premises, etc. Certainly is an express waiver, upon the part of the lessors, of all demands or notice. Again, there is another reason why a demand for a reëntry was not necessary, if such a demand, under the provisions of the lease, was essential. It is that appellees' ancestor was in possession at the time of the death, and her possession must be deemed to have been continued in appellees, who are her heirs, and to whom the premises descended. Appellees, therefore, being already in possession of the lands, manifestly could not reënter the same as they certainly could not enter upon themselves. *v. Hukill*, 34 W. Va. 49, and authorities cited; *Maxwell v. Todd*, 112 N. C. 677. It is also true that the mere inaction or silent acquiescence upon the part of the lessor is to be construed as a waiver of a breach of the condition of the lease. *Lindsey v. Lindsey*, 45 Ind. 552-567; *Jackson v. Gysler*, 1 Johns Cases, 125; 2 Taylor's Land. and Ten., 498.

Without further extending this opinion, we are constrained to hold that the court did not err in its conclusions of law upon the special finding of facts. We have carefully read and considered the evidence, and are satisfied that it fully supports the finding and judgment of the lower court; and the court did not err in denying the motion for a new trial. We discover no error in the record, and the judgment is therefore affirmed.

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Wabash R. Co. v. Ray, Adm.

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**THE WABASH RAILROAD COMPANY v. RAY,  
ADMINISTRATRIX.**

[No. 17,432. Filed Nov. 15, 1898. Rehearing denied April 5, 1899.]

**SPECIAL FINDING.—*Failure to Find Essential Fact in Favor of Party Having Burden of Proof.***—Where the party asking for judgment on a special verdict is not the one upon whom rests the burden of the issue, he is entitled to judgment in the absence of an essential fact which it was incumbent upon his adversary to establish. pp. 393, 394.

**SPECIAL VERDICT.—*Only the Facts Found are to be Considered by the Court.***—The jury being required in their special verdict to find facts, mere conclusions, surmises, and evidence have no legitimate place therein, and are entitled to no consideration by the court. p. 394.

**MASTER AND SERVANT.—*When Hazard Assumed by Servant.***—Where a danger or hazard of the business is alike open to the observation of all, the master and the servant, under such circumstances, are on an equality, and the former is not liable to the latter for an injury resulting from such danger. p. 399.

**SAME.—*Assumption of Risk by Servant.***—An employe who has knowledge, or who by the exercise of ordinary diligence or observation can learn the imperfections of machinery or appliances with which he works, or the hazards of the premises where he performs the duties of his employment, and continues in the service without objection or promise of repairment, will be deemed to have assumed all the risks incident to such defects and hazards. pp. 400, 401.

**SAME.—*Railroads.—Brakeman—Assumed Risk Incident to Unblocked Space at End of Guard-rail.***—Plaintiff's intestate, acting in the capacity of freight brakeman in the employment of defendant company, passed over defendant's line of railroad once a day, except Sunday, for a month prior to the accident which resulted in his death. During the period of such employment the defendant company maintained guard-rails at fifty of the crossings over such road. The open spaces at the ends of such guard-rails were all left unblocked. Plaintiff's intestate, who knew, or might have known by the exercise of ordinary care, that the spaces at the ends of the guard-rails were left unblocked, and while attempting to make a coupling caught his foot in one of the open spaces, and before he could extricate it he was run over by the cars and killed. Held, that plaintiff's intestate assumed the risk incident to the unblocked space at the end of the guard-rail. pp. 394-405.

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164	541
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the Whitley Circuit Court. *Reversed.*  
Adams and Stuart Bros. & Hammond, for appel-  
le & Ninde, for appellee.

AN, J.—The appellant railroad company owned and had as one of its branches a railroad extending from the Detroit, Michigan, through Columbia City, Indiana, to the city of Peru, in the latter State. Appellee is the widow of William O. Ray, deceased, who was at and near his death in the employ of appellant as a brakeman on one of its local freight trains. He was accidentally killed while coupling cars at Columbia City, by catching his foot in a locked guard-rail, and while in such condition was run over by the car which he was attempting to couple.

To recover for this alleged negligent killing, the appellee had fully prosecuted this action in the lower court, and, by a special verdict by the jury, obtained a judgment for the plaintiff.

The alleged errors of which appellant complains, in its opinion, are based upon the decision of the court in overruling its demurrer to the amended complaint, and in denying its motion for a judgment upon the special verdict of the jury, and in overruling its motion for a new trial.

We may, at least for the present, pass the consideration of the sufficiency of the complaint, for the reason that substantially the same facts, and the same theory thereunder, are established by the special verdict, and if we can hold that, upon the facts therein found, appellee is entitled to a judgment, such a holding will certainly result in sustaining the plaintiff's intent. Counsel for appellant earnestly insist that their motion for a judgment in favor of appellant, upon the special verdict, ought to have been sustained. Preliminary to the consideration of this insistence, we may properly refer to the familiar and well settled rules applicable to a special verdict, one of which is that it is the very essence of such a verdict that it state all the material facts within the issues of

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the case, and no omission of a fact therein can be supplied by intendment. Its failure to find a fact in favor of the party upon whom the burden of establishing it rests is the equivalent of an express finding against him as to such fact. When the party having the *onus* in a case asks a judgment upon a special verdict, the material facts therein found, within the issues, must establish his right, under the law, to a judgment, otherwise he must fail in his demand; but where, as in this case, the moving party is not the one upon whom the burden of the issue rests, his right to be awarded a judgment does not depend alone upon the presence of material facts, but he may be entitled to the judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish.

The jury, therefore, being required in their special verdict to find facts, mere conclusions, surmises, and evidence, have no legitimate place therein and are entitled to no consideration by the court. *Cook v. McNaughton*, 128 Ind. 410; *Cleveland, etc., R. Co. v. Miller, Adm.*, 149 Ind. 490.

It may be said that the verdict in this case is open to the objection that the jury, in several instances, stated their own conclusions and conjectures; eliminating these, however, as we must, the material facts embraced therein, and necessary to the solution of the question presented by counsel, may be summed up and stated as follows: Appellee's decedent was, at the time of his death, a skilful railroad brakeman, thirty years old, sound in body, and in good health. At the time of the fatal accident, he was in the employ of the appellant as a brakeman on one of its local freight trains, which ran over its road between the town of Butler and the city of Peru. His said employment as brakeman by appellant began on February 9, 1893, and he continued to serve as such brakeman on the train above mentioned until the time of his death, on March 14, 1893. During that period he ran on said train each day, except Sunday, over the road as follows: One day he would run from the town of Butler, through Columbia

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to Peru, and the next day, he would return with his over the same route from Peru to Butler.

The defendant for more than two months prior to March 1893, maintained a certain spur-switch and side-track in Columbia City, which switch branched off from the main track of the railroad about fifty feet east of the point where the main track crossed Main street, in Columbia City. This switch extended westward from its junction with the main track for a distance of 400 feet. The south rail of this switch was about seven feet and nine inches north of the north rail of the main track where it crossed Main street, and the main track of the switch crossed this street nearly at a right angle. Main street, in Columbia City, including its sidewalks, is eighty feet wide, and the east line of this street is fifty feet east of the junction of the main track of the railroad.

Two months and more prior to the death of the deceased, the defendant placed and maintained two guard-rails, for a distance of forty-five feet, across said street. The east and west ends of these guard-rails were about the same distance from the east and west boundaries of this street. One of these guard-rails was placed and maintained two and three-eighths inches from the north rail of the switch, and the other the same distance from the south rail, and these guard-rails were so placed between the rails of the switch that each was bent, and flared out from the main rails of the track, until the ends thereof were about fourteen inches from the main rail of the switch. The opening of the east end of the south guard-rail is described in the special verdict as follows: "That the east end of said south guard-rail commenced to separate from the south rail of said track about nine feet from the end thereof, and continued to curve away from the south rail of said track till the east end thereof was seventeen inches from said south rail as aforesaid; that said curve in said guard-rail made a wedge-shaped space between the south rail of said switch and the bent portion of said guard-rail, which, at the point where said guard-rail commenced to recede from said south

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rail, was two and three-eighths inches wide, and which space continued to widen as said guard-rail continued to leave the main rail until it was seventeen inches wide at the end of said guard-rail." The wedge-shaped space between these rails was unblocked, and the verdict states that for this reason it was "extra hazardous" for the decedent, and other employes of the defendant, to couple and uncouple cars moving westward over this open space, for the reason that they were liable, when so engaged, to step into said opening, and thereby cause one of their feet to become wedged and fastened therein so that it could not be withdrawn until such employe would be run over and killed by the car which he was coupling. The verdict states that this space, or opening, could have been prevented by blocking it as follows: "By a wooden block about sixteen inches long and two inches thick, cut in a wedge-shape so that the point would be two inches wide, and then widen as fast as said rail spread;" that such blocking would have prevented a brakeman's foot from passing under the rails, and becoming fastened.

It is further stated in the verdict that the defendant, long prior to the time it employed the deceased, had properly blocked all of its frogs, switches, and guard-rails at said switches, and that the deceased, during the time of his employment up to his death, "saw and knew" that said switches, frogs, and guard-rails were blocked, and safe to pass over. It is then stated that the defendant, carelessly and negligently, and without due caution and care for the safety of the deceased, in operating its train, and in coupling and uncoupling its cars over said switch and over said guard-rails at the crossing of said Main street, failed and neglected to block said space, or opening, between said guard-rails and said south rail, as above described; and that on said 14th day of March, 1893, the deceased was carefully, and in the due performance of his duty, engaged in coupling cars on said spur-switch on and over said open space between said guard-rail and the south rail of said track, and on and over the crossing of said



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street. As he was so carefully engaged in coupling and moving westward between the cars, and over said or opening, he stepped into said opening, whereby his foot became wedged and fastened between said rails so it became then and there impossible for him to withdraw foot, and, while it was so held, the car that he was pling, ran over him and then and there killed him, with any fault on his part.

The verdict then proceeds as follows: "That at the time he so caught and run over and killed, he did not know, and never had known, that said space was not blocked or made for him to couple cars over the same, but from the fact at all the frogs, switches, and guard-rails at said switches, and along the defendant's said road, were properly and fully blocked, the deceased believed, and had reason to believe, said space where his foot caught, and where and by means of which he was killed, was safely and properly locked at the time he was killed, as aforesaid. \* \* \* That the defendant, all the time that the deceased was in its employ, knew that said space was not blocked, nor in any manner made and kept reasonably safe for the deceased and its other trainmen to switch and couple and uncouple cars over the same. \* \* \* Yet the defendant, for and during all of said time, negligently and carelessly failed and refused to block the same or render it reasonably safe."

At the time of the accident the verdict states "that it was necessary for the decedent to give his entire attention to his duties in coupling cars, and that he did not see where he stepped, and did not know exactly where he was on said track at the time he was caught and killed." It is then further stated as follows: "That there were about forty-five guard-rails placed over the highway crossings on said railroad between Butler and Peru during the period that the said deceased was so employed by said defendant, and also about five street crossings at which such guard-rails were placed between the rails of said railroad or its side-tracks, and that the

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purpose of placing said guard-rails at such crossings was to hold and contain gravel and other hard substances on a level with the tops of the rails at said crossings, and to avoid planking the same; that none of said guard-rails during said period were blocked, nor were said crossings, except in one other instance, a part of any system of switching upon said road."

We have in part stripped the special verdict of conclusions and immaterial matter, and the above facts may be said to be those which are essential to the question involved. The theory, upon which the verdict proceeds to impute negligence to the appellant, is founded on the omission of the latter to block the open space at the guard-rail. This rail, it appears, was forty-five feet in length, and located at or near a street crossing in Columbia City. The opening at the east end of the rail, where the accident occurred, began at a point where the guard-rail was two and three-eighths inches from the main rail, and continued to increase in width until at the end of the guard-rail it was seventeen inches wide. The duty, which it is claimed the appellant ought to have performed, was to have placed a wooden block or wedge in the opening, which block, as the jury find, should have been sixteen inches long and two inches thick.

It is seemingly contended by counsel for appellee that the failure to block this opening was negligence *per se*. It is held by some of the authorities that the operation of a railroad without blocking its frogs and switches, is not, as a matter of law, negligence. See *Missouri, etc., R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401; *Hewitt v. Flint, etc., R. Co.*, 67 Mich. 61, 34 N. W. 659. The test of liability would seem to be, in such cases, not whether the railroad company had omitted to block its frogs and switches, as it might have done, but whether the places where its employees were required to work, were, on account of such omission, not reasonably safe for the performance of such work when such employees, under the particular circumstances in the case, were exercising ordinary care. But we may pass this feature of the case with-

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out further comment, and proceed to consider the one so earnestly pressed and argued by counsel for appellant.

They contend that the facts disclose that the condition of the guard-rail was the same at and prior to the employment of the deceased, and so continued during his entire term of service until the time of the accident; that its dangerous condition, if such was the fact, was open and obvious to all, and clearly discernible by the deceased, had he, under the circumstances, exercised the sense of sight with which he must be presumed to have been endowed; therefore, it is insisted that the risk of the alleged hazard on account of the unblocked guard-rail, to which, as claimed by appellee, the deceased was subjected, was one of the risks he assumed, and thereby waived any right of recovery. We recognize the familiar doctrine, so often and so universally asserted, that the master, in the employment of his servants, impliedly obligates himself to exercise ordinary care to furnish them with a reasonably safe place to work, and also with reasonably safe machinery, appliances, and instrumentalities with which to perform their duties. The test or standard in such matters, upon the part of the master, is ordinary care, but, in order to ascertain what would constitute such care in the particular case, the dangers of the service in which the employe is engaged is a factor and must be considered. What might prove to be the exercise of ordinary care under some circumstances might not be such in others. Elliott on Railroads, section 1273.

The general rule relative to the risks which a servant assumes under his employment, to discharge hazardous duties is that he assumes such risks as are ordinarily incident to the discharge of the duties from causes open and obvious, the dangerous character of which he has had an opportunity to ascertain, but he does not assume the risks of unsafe premises, defective machinery, appliances or instrumentalities, unless he has had, or may, from the facts or circumstances, be presumed to have had, knowledge or notice thereof. *Griffin*

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v. *Ohio, etc., R. Co.*, 124 Ind. 326; *Jenney, etc., Co. v. Murphy*, 115 Ind. 566; *Swanson v. City of Lafayette*, 134 Ind. 625; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659; *Peerless Stone Co. v. Wray*, 143 Ind. 574; Elliott on Railroads, sections 1288, 1289.

The doctrine of the assumption of risks, upon the part of a servant, has been frequently applied by the higher courts in cases where the death or injury complained of was attributable to unblocked frogs, switches, or guard-rails of railroad companies. In the following cases, decided by this court, the same question was involved as in the case at bar: *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440; *Ames, Adm., v. Lake Shore, etc., R. Co.*, 135 Ind. 363; *Sheets, Adm., v. Chicago, etc., R. Co.*, 139 Ind. 682. Among those of sister states in which the same question was presented, see *Spencer v. New York, etc., R. Co.*, 22 N. Y. Supp. 100; *McNeil v. New York, etc., R. Co.*, 24 N. Y. Supp. 616; *Appel v. Buffalo, etc., R. Co.*, 111 N. Y. 550, 19 N. E. 93; *McGinnis v. Canada, etc., Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Hewitt v. Flint, etc., R. Co.*, 67 Mich. 61; *Chicago, etc., R. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55; *St. Louis, etc., R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895; *Holum v. Chicago, etc., R. Co.*, 80 Wis. 299, 50 N. W. 99; *Rush, Adm., v. Missouri, etc., R. Co.*, 36 Kan. 129, 12 Pac. 582; *Richmond, etc., R. Co. v. Risdon's Adm.*, 87 Va. 335, 12 S. E. 786.

It is a well affirmed legal principle that where a danger or hazard of the business is alike open to the observation of all, the master and the servant, under such circumstances, are on an equality, and the former is not liable to the latter for an injury resulting from such danger incident to the business. *Swanson v. City of Lafayette*, 134 Ind. 625; *Big Creek Stone Co. v. Wolf, Adm.*, 138 Ind. 496.

It is also well settled that an employe who has knowledge or who, by the exercise of ordinary diligence or observation,

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can learn of the infirmities, imperfections, or hazards of implements, machinery, or appliances with which he works, or the hazards of the premises where he performs the duties of his employment, and continues in the service without objections and without the promise of repairment or change upon the part of the master, will be deemed to have assumed all the risks incident to such defects and hazards, and thereby will be held to have waived his right to recovery for injuries resulting therefrom. While this rule cannot be extended so as to cast upon the employe the duty to search for latent defects in the machinery, appliances, and instruments used by him, or about which he works, or the hidden dangers of places where he is engaged in the line of his duty, yet it does go to the extent of holding that he assumes the consequences resulting from such defects and dangers as are apparent to him or such as, by the exercise of ordinary diligence and by giving proper heed to his surroundings, he might have discovered. *Rietman v. Stoltz*, 120 Ind. 314; *O'Neal v. Chicago, etc., R. Co.*, 132 Ind. 110.

The facts in the case at bar, when tested in the light of the well settled principles to which we have referred, do not, in our opinion, entitle appellee to a recovery. The decedent, as the verdict discloses, was a man of mature years and well skilled as a railroad brakeman. His employment by appellant began on February 9, 1893, at which time and prior thereto, the guard-rail in controversy was in the same condition, and so continued up to the time of the fatal accident. He had served from the date of his employment, continuously as brakeman on one of appellant's local freight trains, until his death, which, as it is stated, occurred on March 14, 1893. Each day, except Sunday, during said period of his employment, the train on which he was braking and switching passed the place where the guard-rails in dispute were located. The main track and the side-track at that point were but seven and three-fourths feet apart. It is apparent,

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therefore, that appellee's decedent, prior to the accident, passed about twenty-eight times very near to the open space occasioned by the unblocked guard-rail. At the time of the accident he was engaged in the line of his duty, as the jury find, in coupling cars over the opening in question. As to whether, at any time previous to his death, he had, or had not, engaged in switching and coupling cars at the point in controversy, the verdict does not expressly disclose. The unblocked opening, into which he stepped and caught his foot, was nine feet in length, two and three-eighths inches wide at one end, and seventeen inches wide at the other.

It is certainly manifest, from the facts, that this unblocked space or opening was so plain and obvious that it could have been seen by the deceased when so close to it as he was at divers times during the period of his employment, had he given ordinary heed to his surroundings. It would surely seem that he would have been able to have discovered this obvious unblocked space at the time of the accident when he was engaged in switching and coupling cars immediately about and over the opening, had he exercised ordinary care or heed, as required, in regard to his surroundings.

The jury apparently offer an excuse for his failure to exercise such care, or heed, by concluding, as they do, that it was necessary at that time for him to give his entire attention to his duties, and therefore he "could not and did not see" where he was placing his foot. If not aware of the condition of the place about and over which he was moving his foot while coupling cars, common prudence, at least, ought to have admonished him to ascertain its character before placing his body, as he did, between the moving car and the one to which it was to be coupled.

The argument of counsel for appellee is that, as it appears, all of appellant's guard-rails at switches were blocked, and that deceased, at the time he was killed, and "always, up to the time of his death, saw and knew that said switches, frogs,

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and guard-rails at said switches were properly blocked, and safe to pass over and couple and uncouple cars and make up trains over the same," therefore he had a right to believe that the guard-rails at the crossing of Main street in Columbia City, where the accident occurred, were in the same condition. This argument is not tenable, and is certainly without force when the facts found by the jury are considered, which reveal that appellant's guard-rails, some fifty in number, at other highways and street-crossings between Butler and Peru, were not blocked.

The fact that the decedent was so circumspect as to see, and know, at all times during his employment, that appellant's frogs, switches, and guard-rails at switches along the route over which he worked were properly blocked, and safe, makes it appear singular that such caution or heed upon his part did not also enable him to discover that the guard-rails at, or near, the crossing of Main street in Columbia City were not blocked. Considering the obvious character of these guard-rails, and the size of the opening of the south rail in which the foot of the deceased was caught, and the many opportunities which he had to ascertain that these rails were not blocked, it becomes apparent, we think, that, prior to the accident, he must have been aware of their condition, or by the exercise of ordinary diligence or observation he could have had knowledge that the opening in question was not blocked.

It certainly is evident, when all the facts are considered, that the opportunities of the deceased to know or learn the condition of these rails were virtually equal to those of appellant. In *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440, the employe caught his foot in an unblocked frog, and, while in that situation, was run over, and killed, by a car. It appeared in that case that the switches and frogs of the railroad company were in the same condition during the entire period of the service of the deceased. This court held that, under the circumstances, the condition of the frog, to which the death of the servant was imputed, was a risk incident to

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the business which he assumed, and it was therefore held that the railroad company was not liable. In the case of *Ames v. Lake Shore, etc., R. Co.*, 135 Ind. 363, the employe was killed by catching his foot in an unblocked opening between the abutting rails of a switch, and while in that condition was run over and killed by a moving train. It was held by this court that the question presented in that appeal was not one of contributory negligence, but one involving the assumption of the risk as incident to the service. It was there asserted that it was not only incumbent upon the plaintiff, in such cases, to show freedom from contributory negligence, but that it also devolved upon him to show, by facts, that the injury for which the recovery was sought was not the result of some hazard of the service assumed by those employed therein; and it was held, under the facts in that case, that the railroad company was not liable, for the reason that the deceased servant had assumed the risk incident to the use of the unblocked switch.

In the case of *Sheets v. Chicago, etc., R. Co.*, 139 Ind. 682, the servant was killed by catching his foot in an unblocked "switch angle," and while in that situation was run over, and killed, by a car which he was attempting to couple. It was alleged in the complaint that the deceased did not know, and had no means of knowing, that the angle or frog in question was not blocked; that at no time while in the service of the railroad company did he have the means or opportunity to inspect the angle or frog in question, and thereby discover the defect; that at the time of the accident, the ground was covered with snow so that it was impossible to discover the absence of the block. The complaint was held upon demurrer to be insufficient to entitle the plaintiff to a recovery, and, in the course of the opinion, Dailey, J., speaking for the court, said: "The duties of a brakeman include the handling of switches, and the coupling and switching of cars, and in the performance of these duties, he could readily learn if blocks had been provided to lessen the danger of the service.



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The danger incident to an unblocked frog or switch is in no sense a latent one. On the contrary, it must be obvious to the most casual inspection. Any man of mature years must know that if he puts his foot into an acute angle formed by two converging lines of rail, there will be danger of his foot being caught or held thereby."

It was held, in that case, that the employe assumed the risk incident to the unblocked frogs and switches of the railroad company in whose service he was engaged as a brakeman at the time of the accident. The holding in that appeal, under the facts, which presented a stronger case in favor of the plaintiff than do those in the case at bar, is virtually decisive that there can be no recovery in this action.

The danger of the unblocked rail in this case, in the light of the facts, is certainly shown to have been open and obvious to all, and the deceased had many opportunities to see it; and, under a well settled doctrine heretofore mentioned, it must be presumed that he saw what he might have seen had he looked, and there can be no escape from the conclusion that, by his continuation in the service, he assumed the risk or hazard which resulted in his lamentable death.

For the reasons stated, the facts set out in the special verdict do not entitle appellee to a judgment against appellant. We have also considered the evidence and it may be said upon no view thereof can a recovery by the appellee be sustained. The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain appellant's motion for judgment in its favor on the special verdict.

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**ALLEN v. THE STUDEBAKER BROTHERS MANUFACTURING COMPANY ET AL.**

[No. 18,581. Filed April 6, 1899.]

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**PLEADING.**—*Answer.*—*Verification.*—*Harmless Error.*—Plaintiff brought suit to foreclose a mortgage executed by defendants, and also certain mortgages executed by defendants' grantors upon the same property, the payment of which had been assumed by defendants as a part consideration for the sale of the property to them. Defendants filed an unverified answer, alleging the invalidity of the sale to them and the consequent want of consideration for their promise to pay their grantors' debts. *Held*, since such answer could have been stricken out on motion by reason of its failure to comply with section 867 Burns 1894, requiring such a pleading to be verified, that sustaining a demurrer thereto was harmless, if error, as the correct result was reached. *pp.* 406-411.

**SAME.**—*Answer.*—*Estoppel.*—Defendants cannot avoid the payment of the debts of a corporation assumed by them in the purchase of property as part of the purchase money thereof on the ground that the deed to them was invalid and conveyed no title, where they were in possession of the property, without objection, claiming to own the same, had made valuable improvements thereon, and executed a mortgage upon same to plaintiff to secure such purchase money. *pp.* 406-411.

**APPEAL AND ERROR.**—*Exception.*—*Judgment.*—An assignment that the court erred in rendering judgment in favor of a party who had neither complaint nor cross-complaint upon which to base the judgment presents no question on appeal, where no objection or exception was made to the rendition thereof in the court below. *pp.* 411, 412.

From the Grant Circuit Court. *Affirmed.*

*John A. Kersey*, for appellant.

*H. J. Paulus*, for appellees.

**MONKS, C. J.**—This action was brought by "The Studebaker Brothers Manufacturing Company," against its co-appellees and appellant to foreclose three mortgages on real and personal property, and to recover judgment on the notes secured thereby.

The complaint of the plaintiff below was based upon five promissory notes, and the mortgages given to secure the same.

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*Allen v. Studebaker Bros. Mfg. Co.*

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The notes and two of the mortgages, one on real, and the other on personal property, were executed by the appellee, The Studebaker VonBehren Mfg. Company.

It is averred in the complaint in substance, among other things, that in January, 1893, said Studebaker VonBehren Manufacturing Company, by deed, sold and conveyed all of its property, real and personal, being the same real and personal property described in said mortgages, to appellant and Clement W. Studebaker, as partners, who, as a part of the consideration for said property, assumed and promised to pay the indebtedness of the said corporation, including the indebtedness secured by said mortgages; that afterwards, in August, 1893, said appellant and Clement W. Studebaker, doing business under the firm name of Studebaker and Allen, executed to said plaintiff below a mortgage on all of said real and personal property described in the mortgages aforesaid, as an additional security for the indebtedness of said Studebaker VonBehren Mfg. Co. secured by said two mortgages, and that in said mortgage so executed by said firm, it was recited that said firm composed of appellant and said Clement W. Studebaker had assumed the payment of the indebtedness secured by said two mortgages executed by said Studebaker VonBehren Mfg. Co.

Said complaint demanded a foreclosure of said three mortgages, and a personal judgment against the Studebaker VonBehren Mfg. Co. on said notes, and against Clement W. Studebaker and appellant on the assumption and agreement to pay the same. Appellees other than the Studebaker Bros. Mfg. Co., the Studebaker VonBehren Mfg. Co., and Clement W. Studebaker were made defendants in the court below as holders of mortgages junior to the three mortgages described in the complaint. Numerous cross-complaints and other pleadings were filed and after issues joined a trial was had resulting in judgments against the Studebaker VonBehren Mfg. Co., Clement W. Studebaker and appellant on the complaint, as well as on a number of the cross-complaints, and a

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foreclosure of the mortgages described in said several pleadings.

The errors assigned by appellant, and not waived, are: (1) The court erred in sustaining the demurrer of the Studebaker Bros. Mfg. Co., the plaintiff below, to the amended second paragraph of appellant's answer to the complaint. (2) The court erred in rendering judgment for Mary A. Studebaker, for the reason that she had neither complaint, nor cross-complaint, upon which to base such judgment.

The amended second paragraph of appellant's answer only purported to answer so much of the complaint as sought to recover a personal judgment against him, on the assumption and promise of Clement W. Studebaker and himself as partners, to pay the indebtedness secured by the mortgages sued upon in the complaint, as a part of the purchase money for the property therein described. It is admitted in said amended second paragraph of appellant's answer to the complaint, that appellant assumed and agreed to pay the indebtedness of the Studebaker VonBehren Mfg. Co. including the indebtedness secured by the mortgages sued upon in the complaint, as a part of the purchase money for the property, but it is alleged that the only consideration there ever was for such undertaking was the said sawmill property and plant, which were then so mortgaged as aforesaid to plaintiff to secure the payment of said indebtedness so sued upon in said complaint; and the defendant and his codefendant Clement W. Studebaker, then took possession of said property and plant, and operated the same successfully and continuously until July 15, 1893, and they applied all the net income thereof to the improvement and betterment of said property and plant, and purchased and added thereto more than \$10,000 worth of new machinery, and increased the capacity and value of said property and plant as a lumber mill in that amount, and said sale was never in any manner authorized or ratified by the directors or stockholders of said Studebaker VonBehren Mfg. Co., and said Studebaker VonBehren Mfg.

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Co. is still a corporation, and still owns, and has a right to the possession of all of said property and plant, and the same never become the property of the defendant and his codefendant Clement W. Studebaker by means of said attempted purchase nor otherwise than their respective interest therein as stockholders of said corporation, \* \* \* “and by reason of the premises, said undertaking to pay said indebtedness is without any consideration, and the consideration of said undertaking has failed.”

Giving this paragraph the construction most favorable to appellant it purports to be a special answer of want of consideration for the appellant's promise to pay the debts of the corporation sued on in the complaint, and the theory of the pleading seems to be, that, as the sale to said firm of Studebaker and Allen was not authorized by the directors or stockholders of the corporation, the deed executed to them as alleged in the complaint was not the act or deed of the corporation, and for that reason no title passed to them thereby, and that therefore there was no consideration for the promise to pay the debts of said corporation. In other words, as the complaint alleges that the sale of the said property to Studebaker and Allen was by deed of the Studebaker VonBehren Mfg. Co., said amended paragraph of answer attempts to deny its execution by said corporation, as alleged in the complaint, by averring that the sale was not authorized or ratified by the directors or stockholders.

Section 367 Burns 1894, section 364 Horner 1897, provides that “When a pleading is founded on a written instrument, or such an instrument is therein referred to; \* \* \* such instrument \* \* \* may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied by pleading under oath or by an affidavit filed with the pleading denying the execution, and when a written instrument \* \* \* is so pleaded or referred to, proof of the names of the makers, assignors, obligors, as-

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signees, payees or obligees shall not be necessary unless the same shall be denied under oath."

The deed to Studebaker and Allen for said sawmill and plant is referred to in the complaint and it is alleged that the sale and conveyance of said property by said deed was the consideration for the promise of Studebaker and Allen to pay the debts of said Studebaker VonBehren Mfg. Co. Said amended second paragraph of answer also alleges the same fact, but claims in effect that the deed that was executed was invalid, and conveyed no title, because the sale of said property was not authorized or ratified by the board of directors or stockholders of said corporation. As said amended paragraph of answer was not verified, nor an affidavit denying such execution filed with such pleading, as required by section 367, 364, *supra*, it could for that reason have been stricken out on motion.

It is not material whether the objection to said paragraph should have been taken by motion or demurrer, for the reason that even if the wrong mode was adopted, which we do not decide, as the correct result was reached, the error, if any, was harmless. Elliott's App. Proc. section 633. Said demurrer was properly sustained, even if section 367, 364, was not in force and the contrary rule prevailed upon the subject. It is not alleged in said paragraph of answer that said corporation had ever questioned the validity of said deed or demanded the possession of said property, or that appellant or the firm of which he was a member, the grantees in said deed, ever surrendered the possession or offered to surrender the possession thereof to said corporation. On the contrary, the allegations of said amended paragraph of answer and the allegations of the complaint, not denied by said paragraph, show that the firm of Studebaker and Allen of which appellant was a member took possession of the real and personal property described in the deed of Studebaker VonBehren Mfg. Co. under said deed,—and if not averred this would be the presumption in the absence of

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anything showing to the contrary (*Roger v. Place*, 29 Ind. 577, 581), and expended \$10,000 in adding new machinery and otherwise improving the same, and that on August 5, 1893, about seven months after they had received the deed for said property, they executed to the plaintiff below a mortgage thereon, including said improvements and additions as additional security for the notes sued upon in the complaint, which they had promised to pay as a part of the consideration for said property. Said firm was in the possession of said property under said deed, claiming to own the same, improving and making additions thereto, executing mortgages thereon, and realizing large profits therefrom, and in all respects treating said property as their own, and so far as the allegations of said paragraph of answer show, this was without objection or claim from said corporation, a codefendant in the court below, or any one else. The facts alleged in said paragraph do not show either a want or failure of consideration for the promise of appellant and his partner. Under such circumstances appellant cannot relieve the firm of which he was a member, from the payment of the purchase money therefor, on the ground that the deed was invalid and conveyed no title. *Woburn v. Henshaw*, 101 Mass. 193, 200; *Comstock v. Smith*, 26 Mich. 306; 2 Herman on Estop., section 1058; Bigelow on Estop. (4th ed.) 488.

The error assigned, that the court erred in rendering judgment in favor of Mary A. Studebaker, presents no question for our consideration. No objection was made in the court below to the rendition of the judgment in favor of Mary A. Studebaker, nor was any exception taken thereto, nor was any motion made to set aside or modify or change it in any manner. To present in this court the question, whether or not the personal judgment in favor of Mary A. Studebaker against appellant was correctly rendered, the objection urged thereto should have been properly presented to the court below, and that ruling, if adverse to appellant, should have been assigned as error. Elliott's App. Proc., sections 345, 346;

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*Cockrum v. West*, 122 Ind. 372, 377, and cases cited; *Rardin v. Walpole*, 38 Ind. 146, 150; *Smith v. Dodds*, 35 Ind. 452, 460; *Buell v. Shuman*, 28 Ind. 464, 466; *Evans v. State*, 150 Ind. 651, 655-656, and cases cited; *Jarrell v. Brubaker*, 150 Ind. 260.

Finding no available error in the record the judgment is affirmed.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.  
LOUIS RAILWAY COMPANY v. HOSEA,  
ADMINISTRATRIX.

[No. 17,843. Filed April 7, 1899.]

152	412
152	532
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152	44
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160	386
160	397
160	373
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161	97
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171	615

CONSTITUTIONAL LAW.—*Railroads.—Employers' Liability Act.*—The act of March 4, 1893, sections 7083-7087 Burns 1894, known as the Employers' Liability Act, making railroads and other corporations, except municipal corporations, liable for injuries to employees resulting from negligence of co-employees, and prohibiting such corporations from entering into contracts with employees releasing them from liability to any employe having a right of action under the provisions of said act is constitutional. *p. 416.*

RAILROADS.—*Master and Servant.—Employers' Liability Act.—Release.—Voluntary Relief Association.—Election of Remedies.*—A contract entered into with a railway voluntary relief association by an employe of a railroad company agreeing that the acceptance of benefits from such association for injury or death should operate as a release of all claims for damages against the railroad company arising from such injury or death, is not a release within the meaning of section 5 of the act of 1893, known as the Employers' Liability Act, section 7087 Burns 1894, prohibiting corporations from entering into contracts with employees releasing them from liability to any employe having a right of action under the provisions of said act, but is nothing more than a choice between two sources of compensation. *p. 416.*

ACTION.—*Personal Injuries.—Death by Wrongful Act.—Personal Representatives.*—Section 285 Burns 1894 creates a new and independent right of action in favor of the personal representatives of a person whose death was caused by the wrongful act of another, and does not confer on the personal representatives the same right or cause of action that would have vested in the deceased in his lifetime for the same act or omission. *pp. 417-420.*

RAILROADS.—*Master and Servant.—Voluntary Relief Association.—Contract.—Release.*—Where a railroad employe entered into a con-



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tract with the relief department of the company to the effect that the acceptance of benefits from such department for injury or death should operate as a release of all claims against the railroad company arising from such injury or death, the acceptance of benefits from the relief department by his widow, who was the sole beneficiary named in the contract, will not bar a recovery for the wrongful death of decedent for the use of his child. pp. 420, 421.

From the Clark Circuit Court. *Affirmed.*

*S. Stansifer*, for appellant.

*Laurent A. Douglass* and *C. B. Harrod*, for appellee:

HADLEY, J.—This action is for the death of appellee's decedent, who was a resident of this State, and who died in the city of Louisville, Kentucky, of injuries there received in coupling cars while in the service of appellant as a switchman, and leaving surviving him appellee, his widow, and one child.

The complaint, pleading the Kentucky statute, commonly known as "Lord Campbell's Act," and which in all material respects is similar to ours upon the same subject, is in two paragraphs. Each paragraph rests upon section 1 of the act of 1893, approved March 4, 1893 (Acts 1893, p. 294), section 7083 Burns 1894. The first paragraph of the complaint charges that the injury was caused by and because of the negligent violation by the engineer of a rule of the company for his guidance. The second paragraph charges the same things as to the engineer and fireman.

Demurrers to each paragraph of the complaint were overruled. Answer in three paragraphs,—the first a general denial; the second a special plea in bar; and the third, the same as the second, pleaded as a partial defense in bar of the widow's right of recovery. A demurrer to the second paragraph was sustained. Trial on denial and partial answer, and judgment for plaintiff for \$2,350 for benefit of child.

The errors assigned call in question the action of the court in overruling the demurrer to each paragraph of the com-

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plaint, and in sustaining the demurrer to the second paragraph of answer.

The second paragraph of answer sets up the following facts: Appellant and other companies operating lines west of Pittsburgh, under the same general management, organized a "voluntary relief department" for the benefit of such employes as might see fit to become members; relief in stipulated amount to be extended to members when disabled, while in the service, from sickness, accident, personal fault, or any other cause, and, in case of death, a gross sum to beneficiary named by member in his application. The relief fund is made up of contractual contributions by the members, retained out of their monthly wages, and interest from investments of the funds. The associated companies will take general charge of the department, guarantee the fulfilment of obligations assumed, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof, will take charge of the fund, and be responsible for its safe-keeping; each of the associated companies obligating itself to contribute its share of expense in the administration of the relief department free of any charge or cost to the relief fund or to the members thereof, including medical and surgical assistance to members in certain cases, salaries and expenses of any character, and guaranteeing that the benefits stipulated for with its own employe members, whether for disability or death, shall be paid in full. The stipulated disability and death benefits are based on amount of monthly contribution by each member. By the rules and regulations it is provided that an employe desiring to become a member must make written application, as per form in the rules and regulations, to the superintendent of the relief department, stating the kind or kinds of relief, the amount to be donated, naming his death beneficiary, making the rules and regulations a part of the application and contract with his employer company, if accepted by the superintendent; the application to contain, among others, the follow-

ing stipulation: "And I agree that the acceptance of benefits from said relief fund for injury or death shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such written instrument as may be necessary, formally, to evidence such acquittance." And the regulations accepted and made part of the application contain the following: "Should a member or his representative bring suit against either of the associated companies for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromise, any payment of judgment, or amount in compromise, shall preclude any claim upon the relief fund for such injury or death."

On the 9th day of August, 1892, the said Charles Hosea, an employe of appellant company, made application to said superintendent (copy with the answer), as required, and containing the foregoing stipulations, naming the amount to be donated each month, and designating his wife, the said Nora Hosea, his death beneficiary. On the 1st day of September, 1892, the application was accepted by the superintendent, and the deceased duly notified, and until his death the deceased continued in the service of said company and membership, making his donations to said fund as in the application, until his injury and death, and, there being due said death beneficiary the sum of \$1,000, the same was paid and accepted by her out of said fund, death having been caused by the injuries mentioned in the complaint. With respect to the complaint, counsel for appellant in his able brief says: "It not being questioned that each paragraph is within the meaning of the statute," section 7083 Burns 1894, "and especially so in view of the fact that the complaint, showing as it does, not only that the injury was caused by the negligence of fellow servants, but also that appellant had promulgated

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proper rules, it is not deemed necessary further to set forth the substance of the complaint. If the statute is unconstitutional, the complaint is bad." No objection to either paragraph of the complaint is pointed out, except that both are obnoxious to the Constitution.

Appellant propounds the following as the questions presented by this appeal:

"(1) Constitutionality of the Employers' Liability Act of March 4, 1893, and especially the fifth section. (2) Whether contracts of the kind in this case are within the meaning of section five, and if so, whether the section is violative of the obligation of the contract in this case, entered into before the act. (3) Whether acceptance of benefits by the death beneficiary of a deceased employe member of appellant's voluntary relief department, bars an action on death."

The first question propounded has been decided by this court adversely to appellant's contention in the case of *Pittsburgh, etc., R. Co. v. Montgomery, ante*, 1. The question had full consideration in that case, and we are content with the conclusion there arrived at.

The first branch of the second proposition, namely, whether contracts of the kind in this case are within the meaning of section five of the act of March 4, 1893, has also recently received consideration by this court in the case of *Pittsburgh, etc., R. Co. v. Moore, Adm., ante*, 345. The contract reviewed in the Moore case is identical in terms with the contract pleaded in the second paragraph of answer in this case, and in the former we held that the contract was not one to release, or relieve, the railroad company from future liability, but a contract that, in the event of injury, the injured party would then, after injury, elect between two sources of compensation, and that his election of one would preclude his rights to the other; and hence the contract was one not forbidden by section five of said act, and must be considered, and its validity determined, in the same manner as if the act of 1893 had not been adopted. We adhere to the views ex-

pressed in the Moore case, and it would therefore be a needless waste of effort to consider the constitutional question presented upon the fifth section of said act.

The complaint discloses that the decedent left surviving him the plaintiff, his widow, and one child. The second paragraph of the answer is pleaded in bar of the action, and appellant's learned counsel, in his able and ingenious brief, earnestly insists that the widow's acceptance, as the sole beneficiary named in her deceased husband's application to and contract with the relief department, of the death benefit, released all right and cause of action against appellant for wrongfully causing the death of her husband, his insistence being that death, under the provisions of section 284 Burns 1894, section 283 Horner 1897, does not create a new or independent cause or right of action, but only continues, to his personal representative, the right or cause of action vested in the intestate before his death; that the paramount thing for which damages may be recovered is the same, whether the recovery is by the intestate in his lifetime, or by his personal representative after his death; and "the action, whether for injury or death, being bottomed on the same wrong, it follows that the power to contract in regard to the injury carries with it the right to contract with regard to death as a result of the injury." If we could accept the premise as sound, we could approve the logic. But, if the premise is false, the conclusion fails.

It is conceded that the death statute of Kentucky, pleaded with the complaint, is similar, in effect, to our section 284, *supra*, and appellant confines the discussion to the interpretation that should be placed upon the latter statute. Section 284 reads as follows: "Where the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the

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same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

It is beyond controversy that at common law a cause of action arising out of an injury to the person died with the death of either party, and that whatever cause or right of action is now maintainable exists by virtue of the statute. The right is of legislative origin, and in its creation the legislature had the power to provide for whose benefit it should exist, and the terms and conditions upon which it can be maintained. There appears no warrant in the statute for the assertion that it was the legislative intent to keep alive the cause or right of action vested in the intestate. It is true that the right of action provided by the statute must rest upon the same wrongful act or omission, and be tested and established by the same facts and rules of evidence; that is to say, if the facts supported an action in the intestate against the defendant for a wrongful act or omission, and he did not or could not avail himself of it, upon his death therefrom the statute gives an action for the same cause to his representative for the use of his widow and children. *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 369; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 444.

But, even if the actions are grounded upon the same wrong, it is more reasonable and logical to hold that the intent of the legislature was to create a new and independent right of action upon the failure of another for the same wrong; that is, in cases where the damage resulting from the wrong is transferred to others. By this enactment, it was the obvious purpose of the legislature to prevent the wrongdoer from escaping the civil consequences of his act in a case where his wrong reaches the degree of causing death.

The statute expressly recognizes that, when death ensues from a wrongful act, the next of kin are the persons damni-

fied, and the action is given to compensate them for the damages sustained thereby. In no sense can the action given by statute be said to be the same as that resting in the intestate before his death, further than that the source is the same. In the former the right comes by the common law; in the latter by statute. In the former the elements of damage that were recoverable were for bodily pain and suffering, loss of time and health, and expenses incurred in providing medical attendance, and nursing; in the latter the damages are confined to pecuniary loss. To the widow is allowed, for example, the amount of damages sustained by her in the loss of such support as she was receiving, and was likely to receive, from her husband, to be measured by his present and prospective earnings, less the sum required for his personal support and other family obligations. To his child is allowed, not only for the loss of his support during infancy, but also for the loss of parental care and training for the duties of active life. *Board, etc., v. Legg, Adm.*, 93 Ind. 523, 529, and cases cited. In the former the recovery inured to the benefit of the injured party; in the latter the recovery is for the exclusive benefit of the widow and child, no part of it going to the intestate's estate.

The fact that the action is lodged in the personal representative of the deceased furnishes no valid ground for argument. As the action inures to the benefit of the widow and children, and, upon their failure, to the next of kin, it may often be found impracticable for all the beneficiaries to join as plaintiffs; and doubtless, as a matter of convenience, the legislature provided a trustee for them in the personal representative of the decedent.

We therefore conclude that section 284 Burns 1894, should be construed as creating a new and independent right of action for the use of the next of kin, its validity to be tested by the right of the intestate to maintain an action for the same wrong, had he lived. This view finds support in the following authorities: *Burns, Adm., v. Grand Rapids, etc., R.*

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*Co.*, 113 Ind. 169, 171; *Hamilton, Adm., v. Jones, Adm.*, 125 Ind. 176; Elliott's Railroads, section 1361; *Pym, Adm., v. Great Northern R. Co.*, 4 Best & S. 396; *Hanna, Adm., v. Jeffersonville R. Co.*, 32 Ind. 113; *Hilliker v. Citizens St. R. Co.*, ante, 86.

The case of *Hecht v. Ohio, etc., R. Co.*, 132 Ind. 507, is urged upon us as declaring a different interpretation of the statute. We cannot accept this case as an authority upon the question we have here. The question before the court in the Hecht case was entirely different, and rested upon entirely different grounds. The intestate, in his lifetime, had successfully prosecuted an action for his injuries, and had received payment of the judgment, and had thereby extinguished his right of action before his death; and the question there considered and decided by the court was that the intestate, having exhausted his right of action by a recovery of all the damages resulting from the wrongful act, could not have maintained another action therefor had he lived, and hence no action accrued, under the statute, for the use of his widow and children. If we construe the language of the court in the light of the question under consideration, we are unable to find anything in support of appellant's contention that the cause or right of action conferred upon the personal representative of the deceased is the same right or cause of action that was vested in the deceased in his lifetime. The court expressly says on page 512 of the Hecht case that "it is true in a certain sense that section 284 Burns 1894, gives a new right of action in favor of the widow and children." It follows, therefore, that whatever may be said with respect to the power of the intestate to contract away his right of action against the appellant, he surely had no power to bargain away his family's right of action given by statute against the one wrongfully causing his death.

The widow, as beneficiary, accepted the death benefit of \$1,000, and released appellant from liability. But her release in no way affected the rights of the decedent's child.



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She could release only what she was entitled to. *Pittsburgh, etc., R. Co. v. Moore, Adm., ante*, 345. She sues in her representative capacity, as well for the child as for herself as widow.

The second answer is pleaded in bar of the whole action, and is only sufficient as to a part. The demurrer thereto was properly sustained. Appellant's counsel suggests an extraterritorial question, namely, whether the sufficiency of the complaint is to be determined by the laws of this State, or Kentucky, where the accident and death occurred. But he has not argued the question in his brief and we must, therefore, deem it to be waived. *Western Union, etc., Co. v. Kilpatrick*, 97 Ind. 42, 49; *Fairbanks v. Meyers*, 98 Ind. 92; *Kennell v. Smith*, 100 Ind. 494; *Daniels v. McGinnis, Adm.*, 97 Ind. 549.

Finding no available error in the record, the judgment should be affirmed. Judgment affirmed.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.  
LOUIS RAILWAY COMPANY v. BECK.

[No. 18,285. Filed April 7, 1899.]

**PLEADING.**—*Complaint for Damages for Wrongful Appropriation of Real Estate.*—In an action against a railroad company for the wrongful appropriation of certain lands, a complaint alleging that plaintiff is the owner in fee, and was in peaceable possession under claim of title of described lands of a certain value, and that defendant wrongfully appropriated such lands to its own use, whereby damages were sustained by plaintiff, for which damages judgment is demanded, states a cause of action sufficient to withstand a demurrer. p. 424.

**PRACTICE.**—*Complaint for Wrongful Appropriation of Land.—Motion to Strike Out.*—In an action against a railroad company it is not error to refuse to strike from the complaint an averment that in the use by the railroad company of the switch or side-track constructed by it on the land appropriated, "a great noise was kept up, and that such use occasioned confusion and detriment to the plaintiff." p. 424.

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**PRACTICE.**—*Overruling Motion to Strike Out.*—*When Harmless.*—The refusal of the court to strike out a part of a complaint alleging that damages resulted from particular facts is harmless, where the special verdict returned by the jury shows that no damages were allowed on that account. p. 424.

**SAME.**—*Motion to Paragraph Complaint.*—*When Properly Overruled.*—A motion to separate complaint into paragraphs is properly overruled, where but a single cause of action is stated. p. 424.

**APPEAL.**—*Error in Overruling Motion to Paragraph.*—*When Harmless.*—Error in overruling a motion to require complaint to be separated into paragraphs is not reversible unless it appears that the appellant has been deprived of some substantial right. p. 424.

**SAME.**—*Special Verdict.*—*Weight of Evidence.*—Where a special verdict is returned, and a new trial is demanded on the ground that the verdict is not sustained by sufficient evidence, such special verdict is entitled to the same presumptions in its favor as are extended to a general verdict. The Supreme Court will not weigh the evidence, nor attempt to decide a conflict in the testimony. p. 427.

**DEED.**—*How Premises Sought to be Described May be Identified.*—For the purpose of identifying the premises sought to be described reference may be had to other conveyances, plats, lines, or records, well known in the neighborhood, or on file in public offices. p. 428.

**EVIDENCE.**—*Deed.*—*Description.*—*Reference to Addition of Town.*—Where a deed, introduced in evidence for the purpose of locating a particular piece of land, locates the starting point of the description of the land by reference to an addition to a town, it is not necessary to introduce in evidence the plat of the addition, the existence and location of which is not in dispute. p. 429.

**ADVERSE POSSESSION.**—*Erection and Maintenance of Telegraph Line by Railroad Company.*—The erection of a line of telegraph poles, and the maintenance and use of a telegraph line along the same by a railroad corporation, in the absence of other evidence of the intention of the railroad company to appropriate the strip of land between the telegraph poles and the right of way of the company, are not sufficient to authorize the conclusion that the interjacent strip of land has been appropriated by the railroad corporation, so as to give the corporation title thereto after twenty years. p. 430.

**APPEAL AND ERROR.**—*Special Verdict.*—*Improper Interrogatory.*—*Harmless Error.*—Where a question and the answer thereto in a special verdict are improper, the error, if any, is harmless if the verdict is sufficient regardless of such question and answer. p. 430.

**SAME.**—*Special Verdict.*—*When Party Cannot be Heard to Complain of Answer to Interrogatory.*—A party cannot be heard to complain of an answer which is directly responsive to a question submitted by him in a special verdict. pp. 430, 431.

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**DEED.—Mistake.—Correction.**—Where a mistake was made in a deed, a deed of correction and confirmation relates back to the time of the original conveyance, no new rights having intervened. *p. 431.*

From the Grant Circuit Court. *Affirmed.*

*N. O. Ross* and *G. E. Ross*, for appellant.

*A. E. Steele* and *J. A. Kersey*, for appellee.

**DOWLING, J.**—Action by appellee against appellant for damages occasioned by the wrongful appropriation of a strip of land claimed by appellee. Demurrer to complaint overruled. Motions to strike out parts of complaint, and to separate complaint into paragraphs, overruled. Answer in two paragraphs: The first being a general denial, and the second a special plea of twenty years occupancy by appellant and its predecessor and grantor, the Union and Logansport Railroad Company, adversely and under claim of title. Reply: (1) denial; and (2) that appellant and its predecessors and grantors never had possession beyond twelve feet from the middle of the railroad, in the direction of appellee's land. Trial by jury, special verdict at request of appellant, and judgment thereon. Upon the motion of appellant, the judgment first rendered and entered was so modified as to show that the sum recovered was for damages sustained by appellee by reason of the appropriation of the strip of land described in the judgment, and on account of the consequent injury to the adjoining lands of the appellee. Motions for a new trial by appellant, and for judgment in its favor on the special verdict. Both motions were overruled. Exceptions to the several rulings of the court were reserved.

The errors assigned and discussed by counsel for appellant are, (1) the overruling of the demurrer to the complaint; (2) the overruling of the motion to strike out parts of the complaint; (3) the overruling of the motion to separate the complaint into paragraphs; (4) the overruling of the motion for a new trial; (5) the overruling of appellant's motion for judgment on the special verdict; and (6) the decision of the

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court in rendering judgment on the special verdict in favor of the appellee.

The complaint is by no means a model of good pleading, but it states that the plaintiff is the owner in fee of the land described, and that he was in the peaceable possession thereof under claim of title; it alleges the value of the land, and its wrongful appropriation by appellant; and it charges that appellee sustained damages thereby, for which damages judgment is demanded. This statement of facts is sufficient to withstand a demurrer, and the ruling of the court thereon was correct.

There was no available error in overruling the motion to strike out that part of the complaint which alleged that, in the use by the railway company of the switch or side-track constructed by it on the strip appropriated, "a great noise was kept up, and that such use occasioned confusion and detriment to the plaintiff" in the possession and enjoyment of his adjoining property. It is said in *Gill, Aud., v. State, ex rel.*, 72 Ind. 266, that "this court has never reversed a judgment because of the refusal of the lower court to strike out of a pleading immaterial matter or surplusage." In *Petres v. Brotherton*, 133 Ind. 692, the decision goes still further, and declares that "it is well settled that a judgment will not be reversed on account of the failure of a court to sustain a motion to strike out parts of a complaint. Elliott's App. Proc. section 639." See also cases collected in 2 Woollen's Ind. Digest, 16472a. In the present case the ruling was not only correct, but it was harmless, as the special verdict shows that no damages were allowed on account of such noise and confusion.

The motion to separate the complaint into paragraphs was properly overruled. A single cause of action was stated, and there was no ground for the motion. Even if erroneous, such ruling would not have authorized a reversal, unless it appeared that the appellant had been deprived of some substantial right. Section 401 Burns 1894; *Wabash, etc., R. Co.*

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v. *Rooker*, 90 Ind. 581; *Bear v. Knowles*, 36 Ohio St. 43; *Goldberg v. Utley*, 60 N. Y. 427.

We are next asked to reverse the judgment on the ground that the evidence is insufficient to sustain the special verdict.

The facts found by the verdict may be summarized as follows:

Appellee is the owner of the tract of land described in the complaint, beginning 125 feet south of the south line of Clark Wilcutt's addition to the town of Marion, in Grant county, Indiana; running thence west to the northeast line of appellant's railroad; thence in a southeasterly direction, on said northeast line of said railroad, to the west line of Branson street; thence north to the place of beginning, being part of the northeast fractional quarter of section seven, township twenty-four, range eight, in said county. He acquired his title in 1886 by purchase from one David Horner, who put appellee in possession of the land. Possession was held continuously by appellee until May 28, 1892, when appellant took possession of a strip thereof, of the average width of twenty feet by 183 feet, off the southwest side of said land. A misdescription in the deed executed by Horner was corrected in an action in the Grant Circuit Court, and a deed of correction was executed to appellee by a commissioner, in pursuance of the order of the court. The land fronts toward the east, and abuts on Branson street, and on the eastern part thereof, on Branson street, there are five buildings, used as business houses, the rear ends of which extend westward, toward appellant's railroad. Appellees's land, so occupied, extends westward from Branson street to a line seven (7) feet from the center of the main track of appellant's railroad; said railroad running from the southeast to the northwest, from Branson street to Adams street, in Marion, and adjoining plaintiff's land on the south side thereof. Appellant, with its corporate predecessors owned and operated a railroad from Branson to Adams street, running as aforesaid, for more than twenty years, prior to May 28, 1892, to

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the width of fourteen (14) feet only. The center of the main track is the center of appellant's right of way. Until May 28, 1892, there was an open passage way, between twenty and thirty feet in width and 183 feet in length, on appellee's land on the southwest side thereof, adjoining appellant's railroad. It had been left open by appellee for the purpose of obtaining access with drays and other vehicles to the rear of his said buildings, to load, unload, and remove goods and materials used and dealt in by the persons carrying on business upon the said premises and said passageway was necessary for that purpose. Said passageway had remained unobstructed until May 28, 1892, when, without appellee's knowledge, before daylight in the morning, appellant entered upon and took possession of said strip and passageway, and constructed thereon a side-track extending the whole length thereof, parallel with its main track. The side-track so constructed partially obstructs said passageway, and ever since said 28th day of May, 1892, appellant has held possession of the strip of land so taken, and has used it as a part of its railroad. The property of appellee adjoining the strip of land so taken and used is damaged by such appropriation and use to the amount of \$200, and the value of the land taken by appellant is \$600.

The Union and Logansport Railroad was operated in 1867, and such road has been operated by said company and by appellant ever since. The main track of this railroad remains where it was first laid. On the 28th day of May, 1892, a side-track extended, northwestwardly, across Branson street, and connected with the main track between Adams and Branson streets, and it was there before 1886. A line of telegraph poles was maintained along the northeast line of the land in controversy prior to May 28, 1892, over which line wires were strung, forming a telegraph line, which was constantly used by appellant in operating its said railroad. The new side-track complained of was constructed between said line of telegraph poles and the main track of appellant's rail-

road. Appellant's railroad, as constructed between Branson and Adams streets, was maintained and operated more than twenty years before May 28, 1892. The value per foot on Branson street (extending back 183 feet) of the land on which the new track was built was \$30 on May 28, 1892. There is land between the new side-track and appellee's buildings of sufficient width for the passage of a wagon and team. Nothing is allowed to appellee on account of the noise and confusion incident to the use of the new side-track by appellant. The land in controversy was used by the public in passing from Adams street to Branson street for twenty years before May 28, 1892.

Where a special verdict is returned, and a new trial is demanded on the ground that the verdict is not sustained by sufficient evidence, such special verdict is entitled to the same presumptions in its favor as are extended to a general verdict. In such cases the court will not weigh the evidence, nor attempt to decide a conflict in the testimony. The jury trying the case are the exclusive judges of the credibility of the witnesses, and of the weight of the evidence, and it is their province to determine what facts are found. They are presumed to have performed the duty imposed upon them by the law impartially, conscientiously, and intelligently. The verdict comes here with the approval and indorsement of the judge of the court in which the case was tried. Great deference ought to be paid to a verdict so obtained, and so sanctioned and approved. It is only when there is a failure of proof on some point material to the issue, and which is necessary to support the verdict, that this court will reverse the judgment, and send the case back for another trial.

Counsel for appellant insist that certain deeds introduced in evidence by appellee are void because of uncertainty in the description of the land conveyed, and because the exact location of certain starting points and boundary lines is not definitely and precisely fixed. The grounds of these objections are not sufficient, in our opinion, to warrant us in overthrow-

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ing the special verdict. Slight inaccuracies of this character in deeds are of frequent occurrence in this country, and are discovered in nearly every trial involving questions of title to lands. They ought not to be permitted to defeat substantial rights, where the description is sufficient to enable the court or jury trying the case to ascertain and identify the premises intended to be conveyed. For such purpose, when necessary, reference may be had to other conveyances, plats, lines, or records, well known in the neighborhood, or on file in public offices. The general rule in construing descriptions is that effect must be given to the intention of the parties to the deed, and, to that end, that shall be considered certain which can be made certain; for a grant shall not fail if the meaning can be spelled out. *Grigsby v. Akin*, 128 Ind. 591; *Pennington v. Flock*, 93 Ind. 378; *Key v. Ostrander*, 29 Ind. 1; *Meikel v. Greene*, 94 Ind. 344; *Gano v. Aldridge*, 27 Ind. 294; *Dunn v. Tousey*, 80 Ind. 288; *Pence v. Armstrong*, 95 Ind. 191; *Peck v. Mallams*, 10 N. Y. 509.

But there is neither inaccuracy nor uncertainty in the description of the land in the complaint, the deeds introduced by appellee, or the special verdict. Take, for example, the description of the land set out in the special verdict. Counsel for appellant assert that the starting point cannot be found. In this they are mistaken. One point in the description is at the intersection of the northeast line of the railroad with the west line of Branson street, and the boundary runs thence north to the place of beginning. Reference to the plat in evidence shows that a line so run would necessarily follow the west line of Branson street northward. The place of beginning, then, must be on the west line of Branson street somewhere north of its intersection with the line of the railroad. But the first line given fixes the point of beginning 125 feet south of Wilcutt's addition to the town of Marion. This "addition" is clearly a tract or plat, which a surveyor, or other person familiar with the business of ascertaining boundary lines, can readily find. Having found the starting point from



the description furnished by the deed itself, there is no difficulty in finding the next point, which is west from the starting point, and on the line of appellant's railroad. The jury found this line of the railroad to be seven (7) feet from the middle of the main track. From the point so established, the line runs in a southeastwardly direction along the said northeast line of said railroad to the west line of Branson street; and these three lines inclose the tract claimed by the appellee, and form its boundaries.

Any seeming uncertainty in the deeds introduced by the appellee disappears upon an examination of the boundaries, and it is found that in every instance these deeds furnish the means for the complete identification of the tract of land in controversy.

It was not necessary that a plat of Wilcutt's addition should be given in evidence. This plat was not a part of appellee's chain of title, but was referred to in some of the deeds as a well known, and definitely located, tract of land. Its existence and local situation were not disputed on the trial.

Counsel for appellant further contend that the appellee ought not to recover in this action for the reason that, before his purchase of the land in controversy, the appellant appropriated it for railroad purposes, by the construction and use of a telegraph line, consisting of poles and wires, along the northeast line of said strip of land, including between said poles and the roadbed of said railroad all of the land occupied by the side-track complained of.

The erection of a line of telegraph poles within the corporate limits of a city or town, and the maintenance and use of a telegraph line along the same by a railroad corporation, in the absence of other evidence of the intention of the railroad company to appropriate the strip of land between the telegraph poles and the line of the bed of the railroad, or the right of way of the company, are not sufficient, in our opinion, to authorize the conclusion that such interjacent strip of land has been appropriated by the railroad corporation. In

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the present case no exclusive use of such strip of land by the railroad company was shown. On the contrary, it appeared that appellee, as the owner of the land, had constantly occupied and used it as a roadway, and for other purposes. The evidence established the fact that the extreme width of the right of way of the railroad company was but fourteen feet, and that the median line of the right of way was along the middle of the main track. This part of the verdict is wholly inconsistent with the claim of ownership of the strip in controversy set up by appellant, and the evidence supports the verdict.

The facts of the present case are easily distinguishable from those in *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16, and in *Prather v. Western Union, etc., Co.*, 89 Ind. 501; and we do not feel inclined, upon the proof before us, to extend the rule as to the constructive appropriation of land by railroad corporations.

Interrogatory number one propounded by appellee is objected to by appellant's counsel because it requires the jury to answer as to the ownership of the land in dispute. The interrogatory is in these words: "Is the plaintiff the owner of the land commencing," etc.? It is insisted that the interrogatory calls for a conclusion of law, and not for a fact. The main issue in the case was the ownership of the land, and all the necessary primary facts of a purchase by appellee from a grantor in possession under a complete title, a delivery of possession to appellee, and continued occupancy by him, were found by the special verdict. If the interrogatory as to the ownership of the land was improper, the appellant can gain nothing from that circumstance, for the reason that the verdict on this branch of the case is sufficient, without the objectionable answer.

Appellant cannot be heard to complain of the statement in the special verdict as to the value per front foot on Branson street of the land taken by the railroad company. That statement was directly responsive to the following interroga-

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tory submitted by appellant: "Int. 25. What was the value per front foot on Branson street, extending back 183 feet, of the ground on which said new track was built, on the 28th day of May, 1892?" "Ans. \$30 per front foot."

No advantage can be taken by appellant of the error in the description of the land in the deed from Horner to appellee. It was averred in the complaint, and proved on the trial, that Horner intended to convey the premises described in the complaint, and that he put appellee in the possession of the same under his deed. The mistake in the description was cured by the subsequent deed executed by the commissioner, under the order of the court, in an action brought by appellee against Horner to obtain such correction; and, as no new rights had intervened, the deed of correction and confirmation related back to the time of the original conveyance.

The evidence is sufficient to sustain the special verdict in every essential particular, and the verdict finds all the material facts required to support the judgment in favor of the appellee.

There being no error in the record, the judgment is affirmed.

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[No. 18,042. Filed Jan. 13, 1899. Rehearing denied April 7, 1899.]

152 431  
163 408

**TRESPASS.—License to Cut Standing Trees.—Death of Licensor.—Revocation.**—Standing trees may be the subject of sale by parol, so as to give the purchaser a license to go upon the land to cut and remove them, but the death of licensor before the license is executed effects a revocation of such license. *p. 432.*

**BOUNDARIES.—Surveys.—Estoppel.**—The owner of land who causes a survey to be made according to law, or consents thereto, loses none of his rights by such survey, and is not estopped from claiming title to his land, notwithstanding such survey remains unappealed from; as an official survey is *prima facie* evidence in favor of the corners so established and the lines so run, and nothing more. *pp. 433, 434.*

From the Warren Circuit Court. *Affirmed.*

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*Edwin F. McCabe*, for appellant.

*C. V. McAdams*, for appellee.

DOWLING, J.—This is an action by the appellee against the appellant for a trespass by appellant in wrongfully entering upon the lands of the appellee, as alleged, and cutting down, and removing therefrom a growing hedge. Answer in denial, and a special plea stating, in substance, that the land on which the hedge stood belonged to the mother of the appellee; that appellant purchased the hedge from her; that upon her death the appellee inherited said lands, and had knowledge of such purchase, but had not forbidden appellant to remove such hedge.

A demurrer to this paragraph was sustained, and this decision presents the first question for review.

Standing trees may be the subject of a sale by parol, so as to give the purchaser a license to go upon the land to cut and remove them. 1 *Ld. Raymond* 182; *Owens v. Lewis*, 46 *Ind.* 488; *Armstrong v. Lawson*, 73 *Ind.* 498; *Cool v. Peters Box, etc., Co.*, 87 *Ind.* 531; see, also, note to *Kingsley v. Hornbrook*, 86 *Am. Dec.* 182. But the death of the licensor before the license is executed effects a revocation of such license. *Hunt v. Rousmanier's Adm.*, 8 *Wheat.* 173; *DeHaro v. United States*, 5 *Wall.* 599; 5 *Lawson's Rights and Remedies*, section 2674; *Carter v. Page*, 4 *Ired. (N. C.)* 424.

The case of *Rogers v. Cox*, 96 *Ind.* 157, to which we are referred by counsel for appellant, does not touch the question as to the effect of the death of the licensor, or owner of the land, before the license has been executed. The appellant had purchased from the appellee a building, whether temporary or of permanent character does not appear, situated on appellee's land. Appellant entered on the land for the purpose of removing the building. Both the parties to the license were living. In an action for trespass, it was held that these facts were sufficient to constitute a defense.

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We think the demurrer to the third answer was properly sustained.

The remaining error assigned is the overruling of appellant's motion for a new trial. The grounds of that motion are, that the finding of the court is contrary to law, and that it is not sustained by sufficient evidence.

The real question involved is the ownership of a narrow strip of land, near the dividing line between sections eleven and fourteen. The hedge alleged to have been wrongfully cut down by appellant, was on this strip. There was evidence, more or less satisfactory, of four different surveys, the object of which was to establish the corners, and relocate the line between sections eleven and fourteen. The correctness of the first, known as the Webb survey, made upon proper notice, in 1871, is not seriously questioned. The subsequent surveys made by Smith in 1881, and by Taylor in 1885, appear to have been informal, and afford little aid in determining the location of the original line. In 1896 a fourth survey was made by one Gemmer, at the instance of appellee, and after notice to appellant. By this survey it appeared that the hedge was upon the lands of appellant.

Appellant contends, that because appellee procured this survey to be made, he is conclusively bound by it, and hence, that the finding of the court is contrary to law.

We do not so interpret the statute. The owner of land who causes a survey to be made agreeably to the provisions of the statute, or who consents to a survey, loses none of his rights by such proceeding or consent. The fact that he has caused a survey to be made, or has consented to one, does not estop him from claiming title to his land notwithstanding such survey remains unappealed from. By such survey he is deprived of no right of action or defense arising from possession, or any other source of title. An official survey is, as the statute declares, *prima facie* evidence in favor of the corners so established, and the lines so run, and nothing more.

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Its legal effect is merely to furnish one species of evidence, which may or may not be material, in the determination of a question of title, and which may be entirely controlled and overcome by evidence of another kind, such as proof of adverse possession under claim of title for twenty years, a valid agreement with the adjoining owner for a different line, and the like. *Herbst v. Smith*, 71 Ind. 44; *Wingler v. Simpson*, 93 Ind. 201; *Riggs v. Riley*, 113 Ind. 208; *Cleveland v. Obenchain*, 107 Ind. 591; *Russell v. Senior*, 118 Ind. 520; *Wood v. Kuper*, 150 Ind. 622; *Williams v. Atkinson*, ante, 98.

This question being disposed of, the application for a new trial stands entirely upon the ground that the finding is not sustained by sufficient evidence.

A great deal of evidence pertinent to the issues was given on both sides. The rule which governs this court will not permit us to weigh it.

We find no error in the decision of the trial court overruling the motion for a new trial. Judgment affirmed.

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LOGAN v. SULT ET AL.

[No. 18,590. Filed April 18, 1899.]

**JUDGMENT.**—*Motion for New Trial.*—*When Does Not Operate as Stay of Execution.*—A motion for a new trial filed after entry of judgment, and within the time allowed by law, does not operate as a stay of execution on the judgment.

From the Marshall Circuit Court. *Affirmed.*

*Harley A. Logan*, for appellant.

*William B. Hess*, for appellees.

DOWLING, J.—The appellant brought suit against the appellees to enjoin them from removing a frame dwelling house from certain lots in the city of Plymouth, purchased by appellant at a judicial sale, and claimed by him under a certificate of purchase. The complaint was in four para-

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graphs, and to the fourth a demurrer was sustained. The only error assigned and insisted upon by appellant is the ruling of the court upon this demurrer.

The material parts of the fourth paragraph are as follows: On the 23rd day of March, 1895, one Philip Heyde was, and ever since has been, the owner of lots numbered seventy-nine (79) and eighty-three (83) in Corbin's addition, etc., to the city of Plymouth, in Marshall county, Indiana; that on said day said Heyde executed and delivered to one Corbin a mortgage for the purchase money of said lots, and that afterwards, Corbin sold and transferred said mortgage to appellant; that Heyde had erected a dwelling house of the value of \$300 on these lots, which was at the time of the purchase of said mortgage a part of the said real estate; that afterwards, on the 17th day of April, 1897, in a foreclosure proceeding brought by the appellees, a judgment was rendered giving to the appellees the right to remove the dwelling house so erected by said Heyde, within ninety days after a sale thereof by the sheriff, as lands are sold on execution; that appellant was a party defendant to the said suit, and that *after the rendition of the judgment*, but within the time prescribed by law, he filed his motion for a new trial of said cause, and that the said motion has not been ruled upon, or otherwise disposed of, in said court, but is yet pending therein; that after the rendition of the judgment aforesaid, and while appellant's motion for a new trial was still pending, appellees caused an order of sale to be issued upon said judgment, and that on the 6th day of September, 1897, at a sale by the sheriff of said Marshall county, by virtue of said judgment and order of sale, the said frame dwelling house was bid off by appellees, and is claimed by them as such purchasers; that neither of said appellees has any claim against said real estate or said dwelling house, or any interest therein, except such claim and interest as were derived through said sheriff's sale; that appellees are threatening to, and, unless restrained and enjoined by the court, will remove said frame dwelling

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house from the land on which it is so situated; that the removal of said dwelling house will be a great and irreparable injury to said real estate, and to appellant's security, and that the mortgagor, Heyde, is wholly insolvent; that appellant's mortgage claim was on the 17th day of April, 1897, reduced to judgment in the Marshall Circuit Court, and that he holds a sheriff's certificate of purchase of said real estate, including said dwelling house; that no part of said mortgage debt has been paid to appellant, and that there is due to him, on his said certificate of purchase \$48.60, with interest from September 6, 1897; that if said dwelling house is removed from said lots, said real estate will be insufficient to secure appellant's claim. Prayer for an order enjoining and restraining appellees from interfering with said real estate, or removing or attempting to remove said dwelling house.

In addition to the facts stated in the foregoing paragraph of complaint, it is admitted in the brief filed by appellant that the appellees furnished the materials used by Heyde in the construction of the said dwelling house, and that the action referred to in the foregoing paragraph was a suit brought by appellees to enforce their lien against said dwelling house for the materials so furnished.

Appellees file their motion to dismiss this appeal upon the ground that appellant has no such interest in the controversy as entitles him to an appeal, and this motion is supported by affidavit. The facts relied upon to sustain the motion are that the appellant, before bringing this suit in the court below, had bid in the undivided two-thirds of lots numbers seventy-nine and eighty-three for the full amount of his judgment; that he had received a certificate of purchase therefor, and that the order of sale as to him had been returned fully satisfied.

Whatever weight these facts might have by way of a defense to the suit brought by appellant for an injunction, it is clear that they furnish no ground for the dismissal of this appeal. It is sufficient to say that the appellant brought



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suit to obtain an injunction; that he was defeated in that suit, and that a judgment was rendered against him on the merits, and for costs. From such a judgment, he has an unquestionable right to appeal. Section 644 Burns 1894.

We proceed now to the examination of the sufficiency of the fourth paragraph of the complaint.

The question for decision is, can an execution or order of sale be issued and enforced, pursuant to a judgment, while a motion for a new trial, filed after the rendition of the judgment, but within the time allowed by the statute, is pending and undisposed of?

At common law a motion for a new trial was required to be made within four days, *exclusive*, after the entry of a rule for judgment; and, if not made within that time, the party complaining could not afterwards be heard on the subject of a new trial. Tidd's Pr. 820. Blacks. Com. Book III, 387-397.

By statute adopted in this State in 1852, section 354 R. S. 1852, p. 119, and reenacted and continued in force September 19, 1881, it is provided that the application for a new trial may be made at any time *during the term* at which the verdict or decision is rendered. Section 570 Burns 1894.

A construction was given to this statute in *Beals v. Beals*, 20 Ind. 163, where it was held that the motion for a new trial might be made even after judgment. This ruling has been followed in several cases. *Hinkle v. Margerum*, 50 Ind. 240; *Cox, Adm., v. Baker*, 113 Ind. 62; *Colchen v. Ninde*, 120 Ind. 88.

In regard to the enforcement of judgments, the statute provides that any party in whose favor judgment has been rendered may at any time within ten years after the entry thereof proceed to enforce the same. Section 686 Burns 1894.

An execution may be issued upon a judgment as soon as the record in the case is read in open court and signed by the

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judge. Section 1382 Burns 1894. *Willson v. Binford*, Adm., 54 Ind. 569; *Jones v. Carnahan*, 63 Ind. 229; *Carpenter v. Vanscoten*, 20 Ind. 50.

While the statute authorizes the filing of a motion for a new trial after the entry of judgment, it does not provide for any stay of execution upon the judgment as a consequence of such proceeding. It cannot be maintained that the mere filing of the motion has that effect. We can perceive no reason why it should. If a party to an action fails or neglects to file a motion for a new trial before judgment, he must take the consequences of such delay. Under a similar statute, the supreme court of Illinois held, in *Parr v. Van Horne*, 40 Ill. 122, that a motion for a new trial made after judgment would not operate in any way to suspend the judgment, or impair its force or conclusiveness.

The views here expressed are not inconsistent with the decisions of this court in *New York, etc., R. Co. v. Doane*, 105 Ind. 92, and *Colchen v. Ninde*, 120 Ind. 88. While a motion for a new trial is undisposed of, there can be no final judgment *within the meaning of the statute regulating appeals*. But, for all purposes other than the right of appeal, the judgment, as soon as entered, read, and signed in open court, is final, and may be enforced by appropriate writ according to its terms.

When it is said in the books that at common law a motion for a new trial suspends the judgment and its effects until the motion is disposed of, the filing of a motion before judgment is referred to. When the motion is filed before judgment, the rendition and entry of the judgment are thereby suspended. It is not said that such a motion after judgment operates to stay execution. The judgment is affirmed.

## IN RE APPLICATION OF ELIZA E. COFFIN FOR CERTIFICATE AND LICENSE TO PRACTICE MEDICINE.

[No. 18,832. Filed April 18, 1899.]

JUDGMENT.—*Vacation of When Taken by Agreement of Attorney Acting Without Authority.—Physician.—Certificate to Practice Medicine.*—In conformity with the act of March 8, 1897, an application for a certificate to practice medicine was filed with the State Board of Medical Registration and Examination. The certificate was refused "on the ground that the applicant had been and was guilty of gross immorality." The applicant appealed to the circuit court, where, by agreement of an attorney acting for the prosecuting attorney without authority, a judgment was entered that the applicant was entitled to a certificate which the board was directed to issue. *Held*, that the judgment so taken could not be sustained.

From the Starke Circuit Court. *Reversed.*

*W. L. Taylor*, Attorney-General, *Merrill Moores, F. P. Vurpillat* and *A. L. Courtright*, for State.

*Albert I. Gould* and *Burson & Burson*, for applicant.

BAKER, J.—Eliza E. Coffin filed with the State Board of Medical Registration her application for a certificate entitling her to a license to practice medicine, surgery, and obstetrics in Starke county, conformably to the act of March 8, 1897. Acts 1897, p. 255, sections 7323a-j Burns Supp. 1897, sections 5352a-j Horner 1897.

In the fifth section of the act it is provided that "The board may refuse to grant a certificate to any person guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke a certificate for like cause. An appeal may be taken from the action of the board."

On October 22, 1897, the board refused to grant her a certificate "on the ground that she had been and was guilty of gross immorality." She gave bond for costs, and appealed to the Starke Circuit Court, which was the proper tribunal.

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*State, ex rel., v. Webster*, 150 Ind. 607. The cause was put on the docket at the March term. The only entry made was "This cause is continued." The next occurrence was on the second day of the following term, May 17, 1898. A judgment "by agreement" was entered that the applicant was entitled to a certificate, and that the board should issue her one. On the twenty-third day of the term a verified motion to set aside the judgment was filed by the Attorney-General. On November 2, 1898, the motion was overruled, and this appeal resulted.

From the motion and affidavits it appears that during the time covered by these proceedings Vurpillat was prosecuting attorney of the forty-fourth judicial circuit, of which Starke county is a part; that Glazebrook was deputy for Starke county, and had charge of all state business therein until April 26, 1898, when he left the county as an officer of the 157th Indiana Volunteer Infantry; that on May 9, 1898, Courtright was appointed deputy prosecutor for Starke county, as successor to Glazebrook, and from that date has continued in charge of all the business of the prosecutor's office in Starke county; that in the interim between Glazebrook's and Courtright's incumbencies Vurpillat was in charge; that Glazebrook before leaving arranged with Robbins to look after his business in court during his absence; that Robbins, acting solely under his supposed authority from Glazebrook, went with the attorneys of Eliza E. Coffin before the court, and consented to the entry of the judgment "by agreement." In his affidavit in support of the motion Courtright affirmed: "And affiant says that on May 17, 1898, while affiant was in the court room of the Starke Circuit Court, affiant heard one Henry R. Robbins let judgment go by agreement in a case in which said Robbins stated that he represented Bradford D. L. Glazebrook, which case affiant afterwards learned was the one entitled above; and affiant says that such judgment was taken without his knowledge or consent." In his affidavit in opposition to the motion Robbins said:

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"That he received authority of B. D. L. Glazebrook to take charge of all of his business at the May term and succeeding terms of this court, except the criminal business he entrusted to A. L. Courtright; that when this cause came up for hearing said Courtright and this affiant were both present, and it was mutually understood by and between them that the disposition of this cause fell to the custody of this affiant." Robbins does not contradict Courtright as to who undertook to act in the case, and on what authority.

In the fifth section of the statute it is made "the duty of the prosecuting attorney of said circuit to appear in such causes and represent the board." The board is not, properly speaking, a party to the appeal from its action to the circuit court. When an application for a certificate is filed with the board, the proceeding is *ex parte*. The board, in acting on the application, is entrusted by the people with the exercise of the police power of the State for their protection. If the applicant appeals from the action of the board, the proceeding is the same one in which the board acted; and the duty, which before rested upon the board, to see to it that certificates issue only to properly qualified applicants, devolves upon the prosecuting attorney and the court. The procedure and the duty of the prosecuting attorney are similar to the procedure and duty in applications for change of name. Section 5864 R. S. 1881, section 7812 Burns 1894. The duty of the prosecutor is similar to his duty in resisting petitions for divorce that "remain undefended." Section 1038 R. S. 1881 and Horner 1897, section 1050 Burns 1894; *Scott v. Scott*, 17 Ind. 309. It is by reason of the people's interest in the subject-matter that prosecutors and courts may not permit these proceedings, *ex parte* in form, to become *ex parte* in fact.

The applicant contends that this appeal should fail because it is manifest from Robbins's affidavit, which was acted upon by the court as true, that Courtright, in consenting to Robbins's claim that this cause was under his control on

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In Re Application of Coffin, etc.

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account of Glazebrook's authorization, misapprehended his duty under the law, and therefore the rights of the people have been lost by neglect so inexcusable that no relief may be afforded. If there is on the civil docket of the court an application for change of name, or a petition for divorce that "remains undefended," or an application for a certificate on appeal, under this act of March 8, 1897, it is the court's duty to notify the prosecutor and require him to act, or to appoint a prosecutor in the case who will act, in behalf of public interests, just as much as it is the court's duty to require the attendance and diligence of the prosecutor in the disposition of criminal causes, or to appoint some one in his stead for that purpose. Section 5865 R. S. 1881 and Horner 1897, section 7813 Burns 1894. A court cannot permit causes of this kind to be terminated "by agreement" of interlopers with any greater propriety or justification than it could tolerate an interloper's entry of *nolle pros.* in the cases on the criminal docket.

The applicant also urges that the ruling was right because the motion did not show any defense to the application. As the record stood prior to the entry of the "judgment by agreement," the applicant was prosecuting an appeal from the action of the board in determining that she was not a proper person, as defined in the act, to be granted a certificate. The entry of the "judgment by agreement" was in violation of law. That the action of the board was right will be presumed until the contrary is legally established on appeal.

Ruling reversed, and cause remanded, with directions to sustain the motion, and to set aside the "judgment by agreement," and to proceed further in conformity with this decision.

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DEPAUW PLATE GLASS COMPANY v. CITY  
OF ALEXANDRIA.

[No. 18,279. Filed Jan. 11, 1899. Rehearing denied April 18, 1899.]

**MUNICIPAL CORPORATION.—Annexation of Territory.—Taxation.—Estoppel.**—Where a corporation, having notice of the attempted annexation of its property to a city, received benefits from the city in the way of fire and police protection for more than three years, and permitted its property to be sold for city taxes without calling in question the right of the city to levy the taxes, it will not be permitted to invoke the invalidity of the act of annexation for the purpose of escaping taxation. *pp. 443-452.*

**SPECIAL FINDING.—Conclusions of Law.—Ultimate Fact.**—Where facts stated in a special finding admit of but one conclusion and lead to but one result, the deduction therefrom is a conclusion of law and not an ultimate fact. *pp. 452, 453.*

From the Madison Superior Court. *Affirmed.*

*John W. Lovett, Fred E. Holloway and Chambers, Pickens & Moores, for appellant.*

*Francis A. Walker, Frank P. Foster and James A. May, for appellee.*

**HADLEY, J.**—The appellant sued the appellee in two paragraphs of complaint. The first seeks to recover the amount collected by the city of Alexandria (appellee) as city taxes for the years 1893 and 1894, and the second to cancel and annul the taxes assessed by the appellee against the appellant's property for the year 1895 and to enjoin the collection of the same.

The first paragraph of the answer admits facts in the complaint which show that the property of the appellant was not legally annexed to appellee, and therefore not subject to assessment for city taxes, but seeks to avoid liability on account of facts therein alleged. Appellant's demurrer to the first paragraph of answer was overruled. The case was submitted to the court for trial, and, upon proper request, the facts were found specially, and conclusions of law stated

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160	160
153	443
163	265
152	443
171	265

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thereon in favor of appellee, and final judgment entered accordingly.

As set forth in the special finding, the facts important in presenting the question involved are as follows: The appellant is a manufacturing corporation under the laws of the State of Indiana, having a factory, plant, and office in Monroe township, Madison county, Indiana, located on a tract of unplatted ground containing thirty-two acres, which ground was conveyed to appellant by metes and bounds by deed of the Alexandria Land & Gas Company on the 28th day of January, 1892; that appellant's only office, factory, and place of business in said county was on said tract of land, and that said tract and the property thereon was the property upon which the taxes are assessed by the city of Alexandria; that its principal office was in Floyd county, Indiana; that said lands were never annexed to the city of Alexandria by any proceedings before the board of commissioners of said county, nor by any resolution of the common council of said city (appellee), upon the request of the plaintiff or any owner thereof; that the appellee caused to be assessed, levied and placed upon its tax duplicate, against said plant, factory, and personal property, as city taxes for the year 1893, the sum of \$520.36; for the year 1894, the sum of \$1,085.37; and for the year 1895, \$1,211.69; that on the 29th day of May, 1895, appellee, through its treasurer, levied upon and sold personal property of the plaintiff for the taxes so assessed for the years 1893 and 1894, to make the sum of \$1,605.25, for the payment of city taxes, which amount of money, with costs of sale, appellee received and retained as the proceeds of said sale, and refused to pay to appellant; that said personal property was bid in by Charles T. Doxey in his individual capacity, he being a director and vice president of the appellant company; that on the 13th day of June, 1896, the plaintiff petitioned the common council of the city of Alexandria, setting forth the aforesaid facts, and asking the common council to refund said money received by it, and to certify off of the tax dupli-



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cate and cancel the amount of taxes so placed thereon against the property for the year 1895, which petition said common council refused, and refused to pay said sum to the appellant, or to certify said taxes off of said duplicate, and is proposing to collect the same. That on the 31st day of January, 1893, Alexandria was a town, and had been for many years before that date, and on said date the town of Alexandria became, by proper proceedings, the city of Alexandria, organized and existing under the general laws of the State of Indiana for the incorporation and government of cities. That on the 28th day of January, 1892, the Alexandria Land & Gas Company, a private corporation, was the owner of a large tract of land, consisting of several hundred acres, including the tract conveyed to the appellant, on which said factory is located, and which lands adjoined the corporate limits of the town of Alexandria; and on said date the Alexandria Land & Gas Company conveyed said thirty-two acres of land to the appellant, which deed was not recorded until the 26th day of January, 1893; that Charles T. Doxey was at the time of said conveyance, and ever since has been, the president and a director of said Alexandria Land & Gas Company, and also vice president and a director of the appellant company. That on May 26, 1892, the Alexandria Land & Gas Company laid off into lots and platted a large portion of its said lands adjoining the corporation into an addition to the town of Alexandria, which plat was duly recorded; that said lots, with the streets and alleys, made an addition to the town of Alexandria and was contiguous thereto, known and designated as the "Plate Glass Addition;" that on the plat of said addition the land of appellant was shown and designated as "DePauw Plate Glass Works;" that lots were laid off and numbered, and streets and alleys designated and dedicated to the public, on three sides of the tract marked "DePauw Plate Glass Works," and the fourth side thereof (south) was bounded by the Lake Erie & Western Railroad, which railroad was also the south boundary of said Plate Glass addition; that the

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tract designated on the plat as "DePauw Plate Glass Works" was excepted from the description of the lands platted, as indorsed on said plat and as reported to the town trustees for approval, and on said plat no streets and alleys appeared to traverse said excepted tract; that at the time of said plat, and the approval of the same by the town trustees, the title of the platted tract, including the excepted tract, appeared of record in the name of the Alexandria Land & Gas Company, but the town trustees knew that appellant had taken possession of said excepted tract and was erecting its factory thereon. That on the 1st day of December, 1892, the board of trustees of the town of Alexandria passed a resolution to extend the corporate limits of said town, so as to include within the corporate limits contiguous plats of ground, taking in, among others, the Plate Glass addition, and attempting to include the grounds of the DePauw Plate Glass works aforesaid, and by the boundaries of the grounds described in said resolution the lands of the appellant were included; that the said resolution was adopted by the board of trustees, and the map and plat thereof showing grounds attempted to be annexed to said town were recorded in the plat book in the recorder's office of the county. That the board of trustees of said town, at the time of said proceedings undertaking to take into the corporate limits of said city the said factory site and property of appellant thereon, believed the same to be a platted tract of ground and, in the passing of resolutions for improvements and expenditures of money, believed that said land of the appellant was liable for taxation for town purposes; that the members of the common council, upon the organization of the city, and all members thereof, believed the said tract of appellant's to have been the tract platted as such as a part of the Plate Glass addition, and that the same was a part of the city, and liable to taxation as such. That all resolutions for improvements, and for the contracting of debts, and for the expenditures of money and obligations requiring continuous expenditures of the city, were made upon the faith that said

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city would derive revenues by taxation of all the property of said city including the appellant's property; and that no member of the common council had notice of any irregularity, except as shown by the record, until the latter part of May, 1896. That the assessed value of appellant's property for taxation by the city is \$72,955; that the total value of all property assessed for taxation in the city is \$1,697,955; that the appellant had no knowledge or information of the manner of the attempted annexation of its property to the town of Alexandria until April, 1896; that none of the improvements made or obligations contracted were for the special benefit of the appellant; that there was no electric light in the immediate neighborhood of its factory, but lights on the street leading to the factory; that the water-works was not near enough to furnish fire protection, but, so far as completed, of double capacity for present needs, and with original purpose of extension to appellant's and other factories later on. That the street leading to the factory had some little graveling done on it; that the appellant had a good water-works system for fire protection of its own, and always kept up steam to operate it, and a night watchman there when the factory was not running; that the fire company of the city was called, and took charge of and control of the fire occurring in plaintiff's factory in 1895 and kept it to one room of the manufacturing plant. That the police had been called to the factory, and made arrests therein, and the factory was situate on a regular police beat; that appellant and all her officers, at the time of the attempted annexation, knew that the appellee had taken such action, and, up to April 1896, believed the plant had been legally taken into the city, but made no investigation of the records, and had no actual knowledge of the character of the proceedings of the city in relation to said annexation. The improvements put in and contracted for by said town and city since the annexation proceedings, besides street improvements under the Barrett Law, are, the improvement of some streets and contract for electric

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lighting of streets, the building of a schoolhouse, construction of a water-works system double the size now necessary and with the purpose of extending the same to various factories, some small bridges, and a fire alarm system; and in said improvements the city has contracted and has outstanding obligations as follows: On account of school building, \$22,000; water-works, \$38,000; has paid on bonds and contracts, \$81,000; general expenditures, \$97,853; on electric light, \$7,266; on streets and alleys, \$14,929; on water-works system, \$15,179; for police protection, \$6,385; for fire department, \$10,828; on bonds and interest, \$16,546. The annual cost of water-works will be \$4,400; the annual cost of electric lights will be \$3,150; of the fire department, \$1,544; of the fire-alarm system, \$1,800; of the police, \$1,300; and the expenditures for the support of schools, in addition to the above, \$14,000.

The errors assigned are: First, that the court erred in overruling appellant's demurrer to the first paragraph of the answer; second, in its conclusions of law.

The assignment upon the action of the court upon the demurrer to the answer presents the same question that arises upon the exceptions to the conclusions of law, and we therefore turn at once to a consideration of the conclusions of law as stated by the court upon the facts specially found. As applicable to the facts the court below declares as a proposition of law, that the attempted annexation of the real estate of the appellant by the town of Alexandria was ineffectual and void; from which it follows that neither the lands of the appellant nor its personal property situate thereon was legally liable to taxation by the city of Alexandria. The statute provides, that, "the common council may, at any time, order the amounts erroneously assessed against and collected from any tax payer to be refunded to him." Section 3618 Burns 1894. This provision of the statute is held to be mandatory. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *City of Indianapolis v. Vajen*,

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111 Ind. 240. The appellant, therefore, should have had judgment in the court below, unless the facts found show acts or omissions of duty on the part of the appellant that will preclude it from asserting its immunity from taxation by the appellee. As bearing upon the principle of estoppel, the facts found show that Charles T. Doxey was president and director of the Alexandria Land & Gas Company and also vice president and director of appellant company through all the proceedings and events in question; and that at the time the Land & Gas Company executed and recorded its plat of the Plate Glass addition, showing in the body of the platted ground the excepted tract designated as the "DePauw Plate Glass Works," the title of record to all of said Plate Glass addition, including appellant's "DePauw Plate Glass Works," was in the Alexandria Land & Gas Company and the town trustees, at the time they adopted the resolution purporting to annex said Plate Glass addition to the corporation, believed the appellant's ground to be a part of the platted territory, and, in describing the same by metes and bounds, included appellant's ground; that all the proceedings of the trustees were placed of record, and, in adopting resolutions for improvements of the town and for the creation of debts and obligations for the benefit of the municipality, the trustees (and succeeding common council of the city) believed that the land of the appellant was within the corporate limits of the town and city, and liable to taxation therein; and that in ordering public improvements, and providing for the preservation of public order, and protection against fire, and in supplying school accommodations, and light and water, for the use and comfort of the citizens of the municipality, the trustees and common council relied upon the appearance of things, and upon the validity of the annexation proceedings as they had existed for more than three years, under the constant observation of the appellant's officers, and without objection, or act, indicating disapproval of being counted as

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a corporator; and the appellant and all her officers had, at the time of the attempted annexation of its property, actual knowledge of the same, and believed the same was regularly taken into the city, and made no objection thereto, and acquiesced therein, from December 1892, to April 1896, and until after the city had paid out and assumed obligations for municipal betterment and comfort for more than \$325,000, and in the meantime had called the city's paid police to its factory to make arrests, and had accepted the services of the city in extinguishing a destructive fire in its factory, and in establishing and maintaining a police beat along its factory property.

Appellant's knowledge of appellee's purpose and attempt to extend the municipal corporation over its property carried with it notice that appellee would treat the property thus added as subject to taxation for city purposes, and that, in providing for the administration and general welfare of the inhabitants of the city, the common council would rely upon the appellant's property to contribute its ratable proportion of the revenues. In May, 1895, the city treasurer of appellee seized appellant's property, and sold the same to pay the delinquent taxes assessed against it by the city for the years 1893 and 1894, and Charles T. Doxey, vice president and director of appellant, bought the property in, and, though he acted in the purchase in his individual capacity, he could not have been ignorant of the fact that the taxes being collected were assessed by the city against the property as being within the jurisdiction of the city, yet he made no complaint or protest that the taxes had been illegally assessed.

The appellant was not in a position to be protected by its silence for want of actual knowledge of the facts. It had notice that action had been taken by the proper authority to annex its property. That action was a public record, and notice of its existence was sufficient to hold the appellant to the consequence of actual knowledge of its character. In this situation, appellant permitted appellee for three years to

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proceed to make costly improvements and assume heavy obligations, openly and in full view without objection, and it could not have been unaware that the common council was induced thereto in part by its belief that appellant's property would bear its ratable proportion of the burden. Appellant's conduct at least tended to induce expenditures and the assumption of debts. It accepted the protection of the municipal government, and for three years acquiesced in a state of things, assisted by itself, that reasonably led the appellee to rely upon its property as taxable for city purposes, and, having accepted benefits at the expense of the city, it cannot now be permitted to invoke the invalidity of the act of annexation to escape taxation.

This court, in *Strosser v. City of Fort Wayne*, 100 Ind. 443, on p. 448, says: "We think that where the question is as to the corporate boundary, and where the authorities who attempt to extend the boundaries act in a public capacity, and in good faith assume to make the change in the corporate boundaries in accordance with the provisions of the law upon the subject, and fail in doing this by mistaking a fact, the corporation may successfully assert the efficacy of the change against a taxpayer who has lived in the territory sought to be annexed, who has for a considerable length of time acquiesced in the validity of such proceedings, and who has, without objection, seen large sums of money expended on the faith that such annexation proceedings were valid."

An eminent English jurist, in discussing the principle of estoppel by acquiescence, says: "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." *DeBussche v. Alt*, L. R. 8 Ch. Div. 286.

Whether the conduct of appellant amounts to estoppel

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*in pais*, or whether it amounts to acquiescence, is not material. It surely amounts to such delay as will disentitle it to relief. *Attorney-General v. New York, etc., R. Co.*, 24 N. J. Eq., 49; *Traphagen v. Mayor, etc.*, 29 N. J. Eq., 206. "High considerations of public policy and of justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property, should act with promptness and proceed with diligence, if he would resist the attempted annexation." *Strosser v. The City of Fort Wayne*, 100 Ind. 443.

It has been many times held by this court that if a taxpayer stands by, and without objection permits improvements to be made which benefit his property, he will be precluded from denying the authority of the municipality to contract for the improvements. *Powers v. Town of New Haven*, 120 Ind. 185; *Ross v. Stackhouse*, 114 Ind. 200; *Taber v. Ferguson*, 109 Ind. 227.

It is a familiar doctrine that one may not occupy two inconsistent positions. He must be confined to one or the other. Hence, during the three years in review, the appellant was within the corporate limits of the city of Alexandria, or without. It could not be within the city to escape burdens imposed by the outlying township, nor within the outlying township to escape burdens imposed by the city. It may not thus find immunity from taxation. It will be held to one jurisdiction or the other. There is nothing in the case to show that the township ever attempted to exercise authority over appellant's property, nor to show that appellant ever acknowledged any such authority, while the facts clearly show an exercise of authority by the city, and a passive submission thereto by appellant.

Appellant's learned counsel vigorously urge in their brief that the findings of the court below are defective, in that there is a failure to find the ultimate fact of "acquiescence," the insistence being that the facts found are but evidentiary, and links in the proof of the ultimate fact.



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From our decided cases it may be stated as a rule that, where facts stated in a special finding will admit of but one conclusion and lead to but one result, the deduction therefrom is a conclusion of law, and not an ultimate fact. *Baltimore, etc., R. Co v. Walborn, Adm.*, 127 Ind. 142, and cases there cited.

The findings sufficiently show that appellant had knowledge of the act of annexation, and that the city had assessed taxes against its property, and an officer of the appellant bought in its property sold by the city for the payment of such taxes, without calling in question the right of the city to levy said taxes. It summoned the city fire department to extinguish a fire at the factory, and the city's police officers to maintain order at its factory, and stood by and received benefits from the city for more than three years, and made no objection to being counted with the corporation, and we think this conduct can lead to but one conclusion, and, hence, a question of law.

The fifth assignment of errors was not discussed, and hence is regarded as waived. Judgment affirmed.

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JOHNSON ET AL. v. SHIRLEY, ASSIGNEE, ET AL.

[No. 18,586. Filed April 19, 1899.]

**PARTNERSHIP.—Mortgage by Individual Partner.—Extent of Lien.—Rights of Firm Creditors.**—A mortgage executed by one partner on his undivided one-half of the partnership property for the purpose of securing his individual antecedent debt, by and with the consent of his co-partner, does not attach to the *corpus* of the partnership property, but only to the mortgaging partner's interest in the surplus remaining after the payment of the firm debts.

From the Boone Circuit Court. *Affirmed.*

*Patrick H. Dutch* and *Winton A. Dutch*, for appellants.

*A. J. Shelby, S. R. Artman, T. J. Terhune* and *Ralston & Keefe*, for appellees.

JORDAN, J.—On and prior to the 12th day of December,

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1896, William S. Jett and George W. Johnson were equal partners engaged as merchants in the sale of hardware and implements at Lebanon, Indiana, under the firm name of "Jett & Johnson." On that day, the firm being insolvent, these partners made a voluntary assignment of its assets and property to the appellee, George C. Shirley, under the provisions of the insolvent laws, for the benefit of all of the creditors of said firm. The deed of assignment was duly recorded on that day, and appellee, as the trustee thereunder, assumed and entered upon the discharge of the duties of said trust. On the 11th day of December, 1896, George W. Johnson executed to appellant, his wife, a chattel mortgage upon the undivided one-half interest in this stock of hardware and implements. On the same day he also executed a chattel mortgage upon the same interest to his brother, James M. Johnson, a co-appellant herein. Both of these instruments were executed to secure antecedent debts owing by said mortgagor in his individual capacity, such debts being in no manner liabilities against the firm of Jett & Johnson. The mortgages were duly recorded on the 12th day of December, 1896, in the recorder's office of Boone county, Indiana. The debts secured by these mortgages aggregate \$3,306. The mortgages upon their face, do not purport to be executed by the firm of Jett & Johnson, nor is there anything therein to indicate or show that they have any connection whatever therewith. They each recite that George W. Johnson, of Boone county, Indiana, etc., does "hereby sell and convey" to the mortgagee therein named "the goods and chattels described as follows, to wit: The undivided one-half interest in the stock of hardware merchandise, consisting principally of hardware, cutlery, firearms, nails, stoves, woodenware, implements, farm machinery," etc. The *situs* of the stock of hardware mentioned in the mortgage is stated, and it is provided in the instrument that, in the event Johnson, the mortgagor, paid the debt secured, etc., then the conveyance was to be void, and it was further provided therein that he was to re-

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tain possession of the property until the maturity of the indebtedness, etc. On the same day that Johnson executed this mortgage, his co-partner, Jett, also executed similar mortgages upon his undivided one-half interest in this stock of hardware to secure an antecedent indebtedness of his own.

Appellee, as assignee, presented a petition to the lower court for the purpose of obtaining an order for the sale of the partnership property assigned to him by this firm, the proceeds of such sale to be applied first in the payment of the debts of the late firm of Jett & Johnson. Appellants, together with the mortgagees, under the mortgages executed by Jett, were, on their own application, made parties defendant to this petition and each separately filed cross-complaints setting up his respective chattel mortgage, and asking that in the event the property was sold by the assignee under the court's order, he be directed first to apply *pro rata* the proceeds arising out of the sale upon the indebtedness secured by the mortgages held by the cross-complainants, etc.

On the issues joined upon the pleading, the court, upon hearing the petition and the matters in issue, ordered that the property be sold by the assignee, including that embraced in the mortgages, free from all liens, and that the proceeds arising out of the sale be applied as follows: First, to the payment of the costs and expenses of the assignment; next, to the payment in full of the claims and debts of the firm of Jett & Johnson; and that the remainder of such proceeds be applied one-half thereof *pro rata* to the indebtedness secured under appellants' mortgages, etc.

Appellants each moved for a modification of the judgment to the effect that the court order that one-half of the proceeds accruing from the sale of the property be applied first to the payment of the expenses of the assignment, and that the remainder of said one-half be applied to the payment in full of the claims held by appellants against George W. Johnson, and secured by the mortgages in question; and, if any portion of the undivided half of such proceeds remained after the

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payment in full of these individual claims, that it be applied upon the indebtedness of the firm of Jett & Johnson. These motions were each overruled, as were likewise the motions for a new trial, filed upon the part of appellants. The firm creditors of Jett & Johnson, upon application to this court, have been permitted to intervene in this appeal, and they, through their counsel, join the assignee in resisting a reversal of the judgment of the lower court.

The contention of the learned counsel for appellants is that the chattel mortgages in controversy are shown to have been executed to appellants by George W. Johnson, of the firm of Jett & Johnson, prior to the assignment, with the consent of Jett, his co-partner. Therefore the insistence is that they must be considered and held to be a lien upon the undivided one-half of the property held by that firm, and consequently that appellants thereby are preferred over the partnership creditors. On the other side it is insisted by the learned counsel for the appellees and the interveners that under the circumstances in this case the mortgages in question must be limited, and considered only as embracing the interest of Johnson in the firm property remaining after the payment of the firm debts and the settlement of the partnership accounts; hence, the application of the proceeds arising out of the sale of the property, as directed to be applied by the court, was proper.

It is contended that there is nothing in either of the mortgages in dispute to indicate that they were intended to cover the *corpus* of the firm property. Counsel say: "Each of the mortgages is executed by George W. Johnson in his individual capacity, and neither attempts in any way, upon its face, to be a mortgage by the firm upon firm property, or a mortgage by the individual member of the firm, with the consent of his co-partner, upon the *corpus* of the firm property." While in fact a partnership is composed of individual members, still a firm so constituted is recognized as a distinct legal entity different and distinct from the persons who com-

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pose it. *Henry v. Anderson*, 77 Ind. 361. Therefore, the principle is universally recognized that a partner's interest in or title to the firm property is not an interest in or title to any specific property. The effects or property of the partnership belong to the firm so long as it exists, and not to the members who compose it. The share or interest of each of its members is the ultimate balance of the firm's property or effects after the payment in full of its debts and obligations and the adjustment or settlement of accounts between him and his co-partners. *Conant v. Frary*, 49 Ind. 530; *Meridian Nat. Bank v. Brandt*, 51 Ind. 56, and cases there cited; *Donellan v. Hardy*, 57 Ind. 393; *McMillan v. Hadley*, 78 Ind. 590; *Ex Parte Hopkins, Assn.*, 104 Ind. 157; *Williams v. Lewis*, 115 Ind. 45; *Menagh v. Whitewell*, 52 N. Y. 146; *Parsons on Part.*, sections 245 and 247; *Bates on Part.*, section 180.

There is another well recognized governing rule pertaining to the law of partnership, which is to the effect that the property of the firm is impressed with an equity for the payment of the firm debts and liabilities, and the latter are given priority over the debts and liabilities of the individual members of the partnership. The authorities, in referring to this equity, sometimes in a general way term it the lien of the firm creditors upon the partnership assets or property. This is a misnomer, as the creditors of the firm, in the true sense of the word, have no lien upon the firm property but have merely an equitable preference or right which a court of equity will enforce in their favor. *Warren v. Farmer*, 100 Ind. 593; *Trentman v. Swartzell*, 85 Ind. 443; *Fisher v. Syfers*, 109 Ind. 514; *Johnson, Rec., v. McClary*, 131 Ind. 105; *Parsons on Part.*, section 246; *Bates on Part.*, section 559 *et seq.* This equitable right or priority exists in favor of the firm creditors only through the right of the partners to have the assets or property of the partnership first applied to the payment of the firm debts in preference to the debts of the indi-

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vidual members composing the firm. Consequently it is recognized and held that the members of the firm may in good faith, by their united action, waive this right by transferring or encumbering the firm property to pay or secure *bona fide* debts of its individual members, for which the firm was in no manner liable or responsible, and thereby deprive the firm creditors of their equitable rights. *Johnson v. McClary, supra*, and cases there cited. There can be no question as to the right of the co-partners of a firm unitedly to dispose of the *corpus* of its property for any purpose when not insolvent, or when enough property is retained to satisfy creditors. While the right of the co-partner to encumber by mortgage his interest in the firm property to secure his own individual antecedent debt cannot be successfully controverted, still the lien of such a mortgage, the authorities affirm, does not attach in any manner to the *corpus* of the partnership property, but only to the mortgaging partner's interest in the surplus remaining after the payment of the firm debts and a balancing of accounts between him and the other member or members of the firm. *Deeter v. Sellers*, 102 Ind. 458, and authorities above cited. Certainly the mortgagee, the creditor of the individual partner, as a general rule, cannot be said to occupy a better position than the partner himself through whom he derives his rights under the mortgage. This doctrine is well recognized by the authorities heretofore cited.

In the light of the principles asserted, we may proceed to consider their application to the questions involved in this appeal.

The firm of Jett & Johnson, as heretofore stated, was composed of William S. Jett and George W. Johnson as equal partners, the latter being the mortgagor under whom appellants claim. It is evident, under the circumstances, when tested by the rule previously asserted, that the only interest that George W. Johnson had in the stock of hardware which he could individually mortgage to secure his own indebtedness was one-half of the surplus remaining after the payment

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of the firm indebtedness and an adjustment or settlement of the partnership matters or accounts between him and his co-partner, Jett. But counsel for appellants contend that the lien of these mortgages attached to the *corpus* of the partnership property by virtue of an agreement between Johnson and his co-partner. There is evidence showing that on the day the mortgages in question were executed, and previous to their execution, Johnson informed his co-partner, Jett, that he was about to make mortgages to appellants on his (Johnson's) one-half of the partnership stock, and that Jett said: "That is all right. You are willing for me to make mortgages to my brothers to secure them for some notes they are on for me." This consent of Johnson's partner, under the circumstances, can not be accepted as controlling. The mortgages, as we have seen, were each executed by Johnson in his individual capacity and they each expressly purport to embrace only his undivided one-half interest in this stock of hardware. Neither of these instruments professes or indicates that the execution thereof is in any manner the united action of the members of the firm of Jett & Johnson, or that the mortgagor contemplates or intends to mortgage or affect in any manner the *corpus* of the property mentioned. It is the undivided one-half interest, declared to be covered by the mortgage, which, in legal effect, as we have seen, is one-half of the surplus of the firm property remaining after the payment of the partnership debts and the settlement of accounts between the mortgagor and his co-partner. In fact, appellants, by their cross-complaint, seemingly themselves place the proper construction upon these mortgages, as it is therein alleged that Jett consented to the execution of the mortgage by "George W. Johnson upon the undivided one-half of said Johnson in the property heretofore described."

In the case of *Conant v. Frary*, 49 Ind. 530, the mortgage there involved on its face purported to be upon the undivided one-half interest of the real estate therein described, which

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was shown to be partnership property. The lower court limited the mortgage lien to the one-half interest of the partner in the surplus after the payment of the firm debts and the settlement of the partnership accounts, and this construction of the mortgage was sustained by this court.

In the appeal of *Menagh v. Whitwell*, 52 N. Y. 146, the court of appeals of New York said: "Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property, free from the joint debts, would be to return to the doctrine, long since exploded that partners hold by moieties as tenants in common.

\* \* \* But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately, than when made by a portion of them, but the property should be deemed to continue in the firm until its title has been divested by some act of the firm."

The mortgages in the case at bar neither were, nor did they purport upon their face to be, the act of the firm by virtue either of any express or implied consent of Jett, the co-partner. The interest which Johnson attempted to mortgage was his undivided one-half, and nothing more; hence the alleged consent of his co-partner, under the circumstances, cannot avail to render them operative upon the *corpus* of the firm property so long as there are partnership claims which demand its application to their payment. *Ewart v. Nave-*



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*McCord, etc., Co.*, 130 Mo. 112, 31 S. W. 1041; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592; *Still v. Focke*, 66 Texas 715, 2 S. W. 59.

In *Reyburn v. Mitchell, supra*, the mortgage was executed by a member of the firm to secure an individual debt, and purported to be upon "his right, title, and interest in the property." The court construed this to include nothing more than the interest of the partner in the surplus remaining after the payment of the firm debts and an adjustment of the partnership matters.

In *Still v. Focke, supra*, it was held that if the instrument of conveyance or assignment is by one of the partners only, in his name, he assuming therein to be the sole owner of the property, only his interest will pass to the assignee, and the property may be seized by a firm creditor in payment of his debt.

The judgment of the lower court directing the application of the proceeds arising out of the sale of the property in controversy, is amply supported by the evidence, and is in harmony with the law, and is therefore affirmed.

THOMPSON, BY NEXT FRIEND, v. THE CITIZENS STREET RAILWAY COMPANY.

[No. 18,143. Filed April 20, 1899.]

**NEGLIGENCE.—Pleading.—Evidence.**—Where a complaint against a street railway company for personal injuries contains only a general charge of negligence in the manner of running cars, plaintiff cannot prove that his injuries resulted from the failure of defendant to furnish a safe place to work, and safe appliances, or that the injury was wilful. *pp. 464, 465.*

**MASTER AND SERVANT.—Negligence.—Personal Injuries.—Proximate Cause.**—Plaintiff was employed by defendant to turn switches at an intersection of its street car lines, and, after turning a switch on the south track, stepped backward toward the north track, and so near it that he was struck by a car going west on the north track, and was injured. There was room for him to stand safely between the tracks at the point where he was injured, but he stepped back-

152	461
155	40

152	461
153	118

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162	91

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169	684

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ward too far in order to avoid a frightened team of horses drawing a car on the south track. *Held*, that the threatening appearance of the horses drawing the approaching car was the proximate cause of the accident, which was one of the risks of the employment assumed by plaintiff. pp. 465, 466.

**NEGLIGENCE.—Street Railroads.—Presumptions.**—It will not be assumed, in the absence of evidence, that the body of a street car passing around a curve at the rate of eight or ten miles an hour will rock upon its trucks to such an extent as to strike a person occupying a position far enough away from the tracks to escape collision with a car passing at a lower rate of speed. p. 467.

**SAME.—Proximate Cause.—Street Railroads.**—A street railway company will not be held liable for an injury to plaintiff caused by a collision with a car because of the fact that the car was running at a rate of speed in violation of a city ordinance, where no causal connection is shown between the speed of the car and the injury. pp. 467-469.

From the Marion Superior Court. *Affirmed*.

*George W. Galvin*, for appellant.

*W. H. Latta, Ferdinand Winter, W. H. H. Miller and J. B. Elam*, for appellee.

**DOWLING, J.**—Appellant brought this action to recover damages for injuries caused by the alleged negligence of appellee.

The complaint is in two paragraphs. The first alleges that while he was engaged in the performance of his duties as an employe of appellee, said appellee, by its negligence, ran its car against appellant, by which he was injured. The second paragraph states that appellee negligently ran its car at a greater rate of speed than six miles an hour, in violation of a city ordinance, and that while so running the same it ran said car against appellant, and permanently injured him.

The cause was tried by a jury, and a special verdict returned, and, on motion of appellee, a judgment was rendered thereon against appellant.

The part of the special verdict necessary to the determination of this appeal is substantially as follows: Appellant, on the 4th day of March, 1893, was sixteen years of age, and of

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average size and intelligence for a boy of that age. He was then, and had been, in the service of appellee for more than one month at the crossing of Washington and Pennsylvania streets, in the city of Indianapolis, turning switch tongues, so as to direct cars going east on Washington street, so that they would turn and run either north on Pennsylvania street, or southeast on Virginia avenue, instead of due east on Washington street. In doing this work he became, and was on said day, familiar with the position of the said car tracks and the running of the cars thereon at said street crossing, and with the surroundings at said crossing; that said Pennsylvania and Washington street cross at right angles; that there is a double track on Washington street, which runs east and west, the cars going east running on the south track, and the cars going west running on the north track, and that these tracks connect with the double track running southeast on Virginia avenue. Appellant's duty required him to be constantly on and about these tracks, and when he turned the switch tongues his duty required him to stand between the tracks on Washington street. On March 4, 1893, appellant threw the switch tongue on the south track for a motor and trailer. There was a car, drawn by horses, following said motor and trailer so near that the horses' heads were right against the dashboard of the trailer. These horses drawing said car on said south track were frightened, and prancing about, and appellant, after throwing said switch tongue as aforesaid, believing, and having reason to believe, that he was in danger of being injured by said horses, in an effort to avoid being injured by said horses, stepped back from the south track so near to the north track that he was immediately struck by the front end of a trailer attached to a motor going west on said north track; that said motor and trailer came from the north, off of Pennsylvania street, and turned west upon the north street-car track on Washington street; that appellant, by looking and listening, could not have seen or heard the cars of appellee which struck

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him approaching before they entered upon the curve at Pennsylvania and Washington streets; that at the time the trailer struck him it was running at the rate of eight or ten miles per hour; that the car to which said trailer was attached was being propelled by electricity; that in stepping back to the point where he was struck, appellant exercised such care as a reasonably prudent man should have exercised under like circumstances, and was, at the time, in the exercise of the care and prudence which an ordinarily prudent person ought to have exercised under the circumstances and surroundings. There was room for appellant to stand safely between the tracks, where he was standing, but the fractious horses and the sway of the trailer made it unsafe; that appellant, before stepping back to the position in which he was struck, did not see the car that struck him, but at the time he was struck he knew that the motor car which was drawing said trailer car had just passed, running very close to his body. Appellant did not, at any time before he was struck, look to see whether said motor car was drawing a trailer or not, but he knew that motor cars, passing in the same direction, did have trailers attached. There was no evidence that there was anything to prevent his seeing the trailer that struck him, if he had looked, but, if he had seen it he could not have avoided collision with it. There was no evidence whether appellant, in stepping back to avoid the horses, looked in every direction, and endeavored to guard against other danger. It was a part of appellant's duty, at the time he was injured, to look out for, and avoid collision with, passing cars. Conductors, by signal, direct motormen when to start and when to stop cars in their charge upon appellee's road. There was nothing to direct the attention of the motorman on the motor car to which said trailer was attached to the position appellant was occupying. The motorman, by the exercise of due care and attention, could have seen the position of appellant in time to have avoided so running his car as to strike him.

The errors assigned call in question the action of the court

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in rendering judgment in favor of the appellee upon the special verdict.

A plaintiff must recover according to the allegations of his complaint, or not at all. In actions founded upon the alleged negligence of the defendant, the plaintiff cannot charge one kind of negligence and prove another. *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160; *Armacost, Adm., v. Lindley, Adm.*, 116 Ind. 295.

There is no averment in the complaint that the appellee did not provide appellant a safe place in which to work; that it failed to furnish him with safe machinery and appliances, or that it did anything which it could have foreseen would render the performance of his duties more hazardous, or that the injury was wilful. The authorities cited upon these propositions may therefore be laid out of the case.

The complaint, as has been seen, contains only (1) a general charge of negligence in running appellee's cars, and (2) a charge that the cars were run by electricity in a grossly negligent manner, at a greater rate of speed than six miles per hour, in violation of an ordinance of the city of Indianapolis limiting the speed to that rate.

The single question, therefore, is presented: Does it appear from the special verdict that the injury to the appellant was the result of the negligence of appellee in running its cars without due care, or at an unlawful rate of speed?

Upon these points the facts, as ascertained by the special verdict, are that appellant had been employed at the intersection of Pennsylvania and Washington streets for more than a month; that his duty was to turn switch tongues on the approach of street cars; that he was familiar with his surroundings, with the various tracks at that place, and with the running of the cars on those tracks.

It is shown by the answers of the jury to the thirteenth, forty-second, forty-fourth, forty-sixth, forty-eighth, and fifty-seventh interrogatories that there was room for appel-

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lant to stand safely between the tracks at the point where he was standing when injured, but that owing to the "fractious" horses, and the "sway" of the trailer car, that place was rendered unsafe; that after throwing the switch tongue on the south track, he stepped backward toward the north track, and so near to it that he was struck by the trailer drawn by a motor car going west on the north track; that he stepped back to get out of the way of the horses drawing an English avenue car, which was following close upon the trailer, upon the south track; that the horses were frightened, and were prancing about, so that appellant had reason to believe he was in danger of being injured by them; that appellant's proximity to the north track was caused by his effort to escape injury from the horses drawing the car of appellee on the south track.

It is evident, we think, that the proximate cause of the accident and injury to the appellant was the threatening appearance of the horses drawing the car on the south track. His alarm from this circumstance led him to step backward toward the north track, and too near it for his safety. The conditions affecting his security at that place were just such as they had been during the whole period of his employment. In a moment of confusion and excitement he miscalculated the space occupied by moving cars on the north track, and he was struck by the front part of the trailer car. Had it not been for the presence, the fright, and the plunging of the horses, no accident would have occurred. *Kistner v. City of Indianapolis*, 100 Ind. 210; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. 251; see note to *Gilson v. Delaware, etc., Co.*, 36 Am. St. 807, 65 Vt. 213; *O'Neal v. Chicago, etc., R. Co.*, 132 Ind. 110. The danger of such an occurrence was one of the risks of the employment, and was assumed by the appellant. *O'Neal v. Chicago, etc., R. Co.*, 132 Ind. 110; *Pennsylvania Co. v. O'Shaughnessey, Adm.*, 122 Ind. 588.

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It is contended on behalf of the appellant that the "sway" of the trailer contributed to the accident, and that the "sway" was due to the velocity with which the car was moving. The verdict does not so find. All that it says is that the place where appellant was standing when injured "was rendered unsafe by the fractious horses and the sway of the trailer car." Precisely what is meant by the "sway" of the car is not clear. Any swinging movement, whether vertical or horizontal, would be covered by the term. The ordinary movement of the car around a curve may be accurately described as a swinging or swaying movement. In describing a curve, the line of the body of the car, on the outside of the curve, forms a tangent to the circle of which the curve is a part. Both ends of the car, on the outer side of the curve, are projected some distance from the track. A position which, alongside of a straight track, would be entirely safe, would be extremely perilous, and altogether untenable, at the side of a curve.

It cannot be understood from the verdict that the jury found that the speed of the trailer caused it to "sway." They nowhere say that it did. Other facts found are inconsistent with a supposition of this kind. At the time of the accident the car was moving at the rate of eight or ten miles per hour. Without evidence of the fact, we cannot assume that the body of a trailer car, running at so moderate a rate, would "sway" or rock upon its trucks to such an extent as to strike a person occupying a position near the track, but far enough away from it to escape collision with a car passing at a slower rate of speed.

It is next insisted that the appellee is liable because the accident occurred while the appellee was violating two provisions of an ordinance of the city of Indianapolis regulating the running of street cars: *First*, as to the rate of speed; and, *second*, as to the space of 200 feet required to be maintained between two cars driven in the same direction.

It may well be doubted whether such provisions of an ordinance, relating to the running of cars, adopted in the year

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1864, and amended in 1876, long before the use of electricity as a motive power for street cars in the city of Indianapolis, can be held to apply to the operation of a street railway so equipped and operated in the year 1893; but it is not necessary for us to decide this question.

The special verdict does not show that the appellee, the Citizens Street Railway Company, was in existence either in the year 1864, when the original ordinance was passed, or in 1876, when the amendment fixing the rate of speed and prohibiting cars going in the same direction from approaching each other within a space of 200 feet was adopted. The jury did not find that this ordinance, and its amendment, applied to the appellee. There is nothing in its title to indicate that it does apply to the Citizens Street Railway Company. The amendment of the ordinance, which is all that is set out in the special verdict, is entitled "An ordinance to amend section twelve of an ordinance authorizing the construction, extension, and operation of *certain* passenger railways in and upon the streets of the city of Indianapolis, ordained and established the 18th day of January, 1864." The ordinance applies to *certain* passenger railways, but to what railways does not appear. Whether the appellee was one of these certain railways is not shown.

If it were assumed by us, without proof, that the appellee, the Citizens Street Railway Company, was in existence in 1864, when the ordinance was adopted, and that it was one of the "certain passenger railways" referred to in the ordinance, and subject to its provisions, the fact that the trailer car was moving at a greater rate of speed than six miles per hour at the time of the accident would not sustain the appellant's case. No causal connection is shown between the *speed* of the car which struck the appellant and the injury. Had the car been moving at the rate of six miles per hour, instead of eight or ten, and had appellant stepped backward as he did, at the instant he did, to get out of the way of the horses, he would have been struck by the passing car, not be-



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cause of its rate of speed, but on account of his position near the track.

We deem it unnecessary to decide whether the act of March 4, 1893, known as the Employer's Liability Act, was in force at the time of the accident, for the reason that the injury to appellant is shown by the special verdict to have been the consequence of his own act in stepping back to get out of the way of the horses drawing a car on the south track. However, upon the question whether a motorman on an electric car and a switch tender working on the same line and for the same company are co-employees, we entertain no doubt that they sustain that relation to each other. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Gormley, Adm., v. Ohio, etc., R. Co.*, 72 Ind. 31; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Slattery's Adm. v. Toledo, etc., R. Co.*, 23 Ind. 81, and cases cited; *Bier v. Jeffersonville, etc., R. Co.*, 132 Ind. 78, and cases cited; *Baltimore, etc., R. Co. v. Little, Adm.*, 149 Ind. 167.

Finding no error in the record, the judgment is affirmed.

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Burr v. Smith.

[No. 18,470. Filed April 21, 1899.]

**BOUNDARIES.—Establishment.—Injunction.—Complaint.**—Plaintiff brought suit to enjoin an adjoining landowner from entering upon her lands and appropriating to his own use a certain strip of land. The complaint alleged that plaintiff was the owner of a certain described tract of land, and that adjoining same on the east was the land owned by defendant; that the respective owners thereof had agreed upon a line dividing such tracts, and constructed a partition fence thereon more than twenty years before the commencement of the action, which had ever since been recognized as the true line, and that defendant had wrongfully entered upon plaintiff's land at a point ten feet west of said line for the purpose of locating a partition fence. *Held*, that the complaint sufficiently alleged that plaintiff was the owner of the land to the partition fence. *pp. 470, 471.*

**SAME.—Adverse Possession.—Pleading.**—A complaint in an action to enjoin an adjoining landowner from encroaching upon the lands of

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plaintiff, which discloses a continued, notorious, exclusive, and adverse occupancy of the land by plaintiff and grantors for a period of over twenty years, is not bad for failure to allege that the occupancy was under claim or color of title. pp. 471, 472.

**APPEAL AND ERROR.**—*Evidence.*—Where there is evidence sufficient to support the finding the Supreme Court will not disturb the judgment upon the weight of the evidence. p. 472.

**EVIDENCE.**—*Adverse Possession.*—*Declaration of Grantor.*—The declarations of grantor made at the time of negotiation and sale of real estate as to the boundaries thereof are admissible in evidence in an action by grantee to enjoin an adjoining owner from encroachment, where the title of plaintiff depended upon adverse possession. pp. 472-474.

From the Henry Circuit Court. *Affirmed.*

*H. L. Burr and William A. Brown*, for appellant.

*E. H. Bundy and J. M. Morris*, for appellee.

**JORDAN, J.**—This action was commenced by appellee, and successfully prosecuted, to enjoin appellant from entering upon certain land alleged to be owned and possessed by the appellee. The questions discussed by the parties relate to the sufficiency of the complaint, and to the action of the court in denying the motion for a new trial.

The controversy between the parties is in regard to the title of a strip of ground situated on the west side of a certain fence line. The complaint may be summarized as follows: Appellee is the owner of five acres of land, described in her complaint, situated in Henry county, Indiana. Adjoining this tract on the east are five acres of land owned by the appellant. In 1871, twenty years and over before the commencement of this action, the respective grantors of appellant and appellee laid out and agreed upon the line dividing said tracts, and constructed on said agreed line a partition fence. This fence, for a period of more than twenty years, has been recognized and considered as the true line dividing appellee's said tract of land, on the east, from that owned by appellant on the west.

Appellee and her immediate grantor, for over twenty

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years, have been in "full, actual, visible, notorious, exclusive, and continuous possession" of the land situated on the west side of this fence, and have held and possessed it, adverse to the appellant and his grantors, during said period of time, by virtue of appellee's title, and that of her grantor, and by virtue of the agreement establishing the fence as the dividing line between the lands of said parties.

In June, 1895, prior to the beginning of this suit, appellant unlawfully entered upon appellee's said land, at a point about ten feet west of the east line of her said lands, and west of this division fence, and dug holes, and planted fence posts therein, and is threatening to build the fence on her said land, and thereby unlawfully appropriate to his own use a certain strip of ground off the east side of her said tract, to her great damage, etc.

It is insisted by appellant that the complaint does not show that appellee claims to be the owner of any land, "either by deed or by adverse possession, other than the land described in the complaint." Hence, it is said, that it is left to be presumed that she is the owner of other lands, not described, on which the fence in question was built under the alleged agreement. There is no merit in this contention. The complaint sufficiently shows that appellee is the owner of the five acres described in the complaint, and that this tract adjoins on the east the lands of appellant, and that the fence in question was the dividing line between those two tracts; that the appellant was erecting and threatened to continue to erect a fence west of the old line fence, upon the very lands of which appellee alleged she was the owner and in possession.

She does not, in her complaint, seek to recover any particular land, but seeks only to enjoin appellant from entering and erecting a fence upon the lands described, of which she, as it is alleged, is the owner.

It is further urged that the complaint is bad for the reason that it does not allege, as contended, that appellant or her

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predecessors occupied the strip of land in dispute under a claim or color of title. It was not necessary, in addition to the facts shown by the complaint, to aver that the land in question was occupied under a claim or color of title. The pleading, as we have seen, discloses a continued, notorious, exclusive, and adverse occupancy of this land by appellee and her predecessors, through whom she claims, for a period of over twenty years. The acquisition of land by adverse occupancy or possession is based upon the twenty-year statute of limitation; and, when this period has completely run, it operates, to all intents and purposes, to extinguish the rights and title of the true owner, and vests the title in fee simple in the adverse occupant. It follows, therefore, that appellant's objections to the complaint are not tenable. *Roots v. Beck*, 109 Ind. 472; *Palmer v. Dosch*, 148 Ind. 10, and cases there cited.

We have read and considered the evidence, and it is sufficient, in our opinion, to sustain the judgment of the lower court. There is evidence showing that the fence in question was considered and recognized by the predecessors of the respective parties herein as a division line, as far back as 1868; and for twenty years, at least, the land in controversy, west of this fence, has been occupied and used up to the fence line by appellee and her immediate grantor. In fact, there is evidence tending to show that the statute of limitation had fully run, and settled the question, as to the prescriptive title of the grantor of appellee, as against the grantor of appellant, before either of the parties to this action became owners of the respective tracts of land lying east and west of the old fence line. There being evidence sufficient to support the finding in favor of appellee, we therefore cannot disturb the judgment on questions arising upon the weight of the evidence.

The court, over the objections of appellant, permitted appellee to prove by her husband, Edward B. Smith, a certain declaration of Michael Carr, appellee's immediate grantor. Carr, at the time he made the declaration in question, it

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appears, was in the actual possession of the land, claiming to be the owner thereof, and Smith, the witness, was proposing to purchase it for appellee, his wife. The witness stated that he inquired of Carr in regard to the fence line in controversy, and asked him if there had been any question about this line, and Carr replied that "there had not been." Counsel for appellant contend that this statement made upon the part of Carr, under the circumstances, was not competent; that it was a self-serving declaration made by him in support of his title, in the absence of appellant, and therefore was not admissible as evidence. Counsel for appellee, on the other hand, maintain that the declaration or statement made by Carr, to the effect that there had been no question raised in regard to this fence line, was competent evidence, because the title to the land involved depended upon the adverse possession upon the part of appellee and her grantor; hence, the declaration was proper as tending to prove, at the time Carr sold the land to appellee, that he was in possession, and claiming title as far east as the fence which was recognized as the boundary line. Carr, as we have said, was, at the time he made the declaration, in actual possession of the land in dispute. The statement in controversy was made by him to the witness, Mr. Smith, who was then proposing to purchase the land for the appellee. His declaration was contemporaneous with his possession, and related thereto, as it at least tended to show the extent of Carr's possessory rights, or, in other words, that his occupancy extended east to this fence line. The fact that he was in possession of the land, and occupied it up to this line, at and prior to the time of appellee's purchase, certainly, under the issues, were facts proper to be introduced in evidence. His possession or occupancy of the land was the act or *res gestae* admissible in evidence, and what he may have declared or said contemporaneous with this possession, explanatory thereof or relative thereto, and germane to the issues in this case, was equally competent and admissible as a part of the *res gestae*.

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It is well settled, as a rule of evidence, that, whenever it is competent to prove an act or transaction, the declaration of the actor, accompanying the act, in relation thereto, or explanatory thereof, may also be proved; and the fact that such declaration is self-serving, or, in other words, will operate to the benefit of the declarant, will not render the declaration incompetent as evidence in his behalf. The declaration in controversy, under the circumstances, comes within the rule asserted and enforced by the decisions of this court. *McConnell v. Hannah*, 96 Ind. 102, and authorities there cited; *Creighton v. Hoppis*, 99 Ind. 369; *Brown v. Kenyon*, 108 Ind. 283; *Durham v. Shannon*, 116 Ind. 403. In Jones on Ev. section 358, the author, after stating that the declarations of those in possession of land, made in respect to boundary lines or the extent of the occupation, are sometimes received as a part of the *res gestae*, says: "Thus to establish adverse possession, the plaintiff may prove the declarations of former owners under whom he claims, when such declarations were made during possession and while defining or pointing out the boundaries to a person negotiating for the purchase." See also in support of this doctrine *Abeel v. Van Gelder*, 36 N. Y. 513.

We find no error in the rulings which appellant has presented for our consideration, and the judgment is therefore affirmed.

## HUNTER STONE COMPANY v. WOODARD, TREASURER.

[No. 18,612. Filed April 21, 1899.]

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**TAXATION.—Corporations.**—*Listing Omitted Property by County Assessor.*—Where a private corporation had, in good faith, made out and delivered to the proper township assessor a verified schedule of its property, as provided by section 73 of the general tax law of 1891 (Acts 1891, p. 241), the failure thereafter of the county board of review to make any assessment for taxes against the property, did not preclude the county assessor from listing for taxation the property of such corporation. pp. 476-479.

**SAME.**—*Listing Omitted Property by County Assessor.*—The failure of the county assessor, on listing omitted property for taxation,

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to file in the county auditor's office a statement of his reasons for listing the property will not render the assessment invalid, where there is no other assessment against the owner of such omitted property. pp. 478, 479.

From the Monroe Circuit Court. *Affirmed.*

*H. C. Duncan and I. C. Batman*, for appellant.

*J. E. Henley and J. B. Wilson*, for appellee.

BAKER, J.—Appellant sought to enjoin the treasurer of Monroe county from collecting taxes for 1897 on property listed by the county assessor. The complaint alleges that the company is a domestic manufacturing corporation located in Monroe county; that between April 1 and June 1, 1897, the company made out and delivered to the proper township assessor the sworn statement required by section 73 of the general tax law of 1891, section 8491 Burns 1894, section 6337 Horner 1897; that the county board of review met in June, but failed to make any assessment of any kind against the company as required by section 74, section 8492 Burns 1894, section 6338 Horner 1897; that on November 1, 1897, the county assessor, without giving any notice, and without describing in any way the property, its value or kind, and without filing with the auditor any statement of any reason for making the assessment or of any facts or evidence on which the assessment was based, assessed the company to the amount of \$17,000, on which the auditor computed taxes in the sum of \$370.60 and entered them in the tax duplicate for 1897; that the auditor delivered the duplicate to appellee as county treasurer, who is about to enforce collection, etc.

The answer is as follows: "That at the meeting of the county board of review of Monroe county, Indiana, in 1897, the auditor of said county failed to lay before said board the schedule and statement herein required to be returned to him as provided by section 73 of the session laws of 1891 of the General Assembly of said State, and at no time during said session of the board of review did said auditor lay before said

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board such schedule and statement; that on account of such failure said county board of review did not pass upon the question of plaintiff's property in said county; that the Auditor of State of the State of Indiana failed to make out the return statements and valuations of plaintiff's said property, nor did such State Auditor furnish to the auditor of Monroe county any statement or return or assessment of plaintiff's said property up to the time of the assessment made by the county assessor of Monroe county herein; that said county assessor in making such assessment gave notice to the plaintiff of his intention to make such assessment as provided by law, and said plaintiff failed and refused to make any objections to the assessment as made by said county assessor; that no assessment of plaintiff's property for the year 1897 was made other than the assessment so made by said county assessor. Wherefore, etc."

A demurrer to this answer for want of facts was overruled, and judgment was rendered for appellee upon appellant's refusal to plead further.

Appellant contends that sections 73 and 74 of the general tax law provide the only method by which its property could be reached for taxation; that the company complied with section 73 by delivering to the township assessor a verified schedule; that the county board of review, having under these circumstances exclusive power to make the assessment, failed to make any assessment whatever against the company; and that, therefore, "the power of taxation was completely exhausted".

Section 108, section 8526 Burns 1894, section 6371 Horner 1897, makes it the duty of the township assessor, whenever he shall discover or receive credible information that any property has been omitted in the assessment of any year or that the tax for which such property was liable has not been paid "from any cause", to proceed to add such property to the assessment. In this section the county assessor is given the same powers.



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Section 113, section 8531 Burns 1894, section 6380 Horner 1897, confers upon the county assessor the powers given to the county auditor and treasurer by sections 142 and 182.

Section 142, section 8560 Burns 1894, section 6409 Horner 1897, and as amended in 1897, acts 1897, p. 141, directs the county auditor, whenever he shall discover or receive credible information that any property "has, from any cause, been omitted in whole or in part in the assessment of any year", to proceed to add the omitted property to the tax duplicate.

Section 182, section 8600 Burns 1894, section 6449 Horner 1897, requires the treasurer to report to the auditor any omitted property he knows of or learns of from credible sources.

Sections 108, 142, and 182 direct the respective officers to give the owner notice in writing of the officer's intention to add the omitted property to the tax duplicate, describing it in general terms, and requiring the owner to appear, etc. Those sections further require the officer who acts to file in the auditor's office a statement of the facts or evidence on which he bases the assessment.

The essence of appellant's argument is that because the omission did not occur through its fault, but through the failure of the board, which was primarily entrusted with the duty of seeing to it that the company contributed its just share of tribute to the government to whose grace the company owed its existence and the enjoyment of its property rights, therefore the government has lost the right to levy against the company any taxes for the year 1897. The tax law contemplates instances of omission of property from current assessment lists, not only on account of evasions and concealments of property owners, but also by reason of derelictions of the officers upon whom rest the primary duty of listing all taxables. It is conceivable that if the primary taxing officers were infallible, there would be no instances of omitted property. Yet so careful is the State to guard against loss to its

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revenues from the remissness of those officers that four different officers are each commanded to look after the State's continuing claim for taxes from property omitted from assessment in any year or number of years and from any cause. Nothing will discharge the State's claim but actual payment, and the general law must be liberally construed in aid of the taxing power. *Graham v. Russell*, ante, 186, and cases cited; section 8642 Burns 1894, section 6491 Horner 1897. But no construction, however strict, would require the officers in listing omitted property to pass by the property of corporations when the statute empowers them to list *any* omitted property, or to overlook omissions resulting from the fault or inaction of the primary listing agents when the statute directs them to list property omitted from *any* cause. There is no doubt of the county assessor's authority to proceed in this case.

Appellant further urges that, even if the county assessor was empowered to act, the collection of the taxes should be enjoined because the assessor did not proceed in strict conformity to the statute. The answer admits, by not denying the averments of the complaint, that the assessor failed to file in the auditor's office a statement of the reasons or facts or evidence on which he based the assessment.

That requirement must receive a reasonable construction. If the name of a corporation appeared upon the duplicate assessed with property at certain valuations, and if the county officials proceeded to list omitted property of the corporation, reasons are apparent why the statement should be filed. But if the corporation is not on the duplicate at all, there is no sufficient reason why it should be heard to complain of the absence of a statement showing what particular property was omitted when no part of its property had been included, or why its schedule was not taken as true when its schedule had not reached the assessment lists.

Furthermore, section 8642 Burns 1894, section 6491 Horner 1897, provides: "No general or specific tax authorized

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by the laws of this State and which shall be assessed on any property in any township, city or town within this State by any officer authorized to make assessments or which if made by another person may be adopted by such officer as his act shall be held illegal or invalid for want of any matter of form in any proceeding not affecting the merits of the case, and which shall not prejudice the rights of the party assessed." Appellant admits that it has not been taxed for 1897 except by the assessment in question. Appellant made out a sworn schedule for 1897 as required by law, expecting the county board of review to act thereon. There is no suggestion that the assessment complained of is one cent higher than its own showing.

And finally, independently of the foregoing statute, the principles of equity would preclude appellant from receiving aid from a court of conscience in escaping a just duty of citizenship admitted to be undischarged. "When he appeals to a court of equity and invokes its extraordinary writ of injunction, he must rely upon some substantial equity, and can not avail himself of naked irregularities, or the neglect of mere forms, to shield himself from a liability confessed to be just." *Jones v. Summer*, 27 Ind. 510; *Reynolds v. Bowen*, 138 Ind. 434. Judgment affirmed.

WEAVER v. STATE, EX REL. SIMS, PROSECUTING  
ATTORNEY.

[No. 18,916. Filed April 21, 1899.]

OFFICERS.—County Treasurer.—Appointment to Fill Vacancy.—Term.

*Construction of Act of March 8, 1897.*—A county treasurer elected at the general election in 1896 qualified and took the office on the 9th of January, 1897, and continued to act until October 11, 1897, when he was removed and another was appointed to fill the vacancy. At the general election in 1898 a third person was elected, who qualified before January 1, 1899. Held, that, under the act of March 8, 1897, (Acts 1897, p. 288), construed with section 2, article 6 of the Constitution, and section 5563 Horner 1897, the person elected at the general election in 1898 was entitled to the office on January 1, 1899.

152	479
154	647
152	479
163	102
153	479
171	628

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From the Elkhart Circuit Court. *Affirmed.*

*J. M. Van Fleet, V. W. Van Fleet and H. C. Dodge*, for appellant.

*E. A. Dausman and W. J. Davis*, for appellee.

MONKS, C. J.—One Holdeman was duly elected, commissioned, and qualified as treasurer of Elkhart county, his term commencing January 9, 1897, at which date he took possession of the office, and continued to act therein until October 11, 1897, when he was removed from said office, and on the same day appellant was appointed to fill said vacancy. Appellant was commissioned and qualified, and entered upon the discharge of his duties on said day. At the general election in November, 1898, one Wood was duly elected treasurer of said county, and on November 29, 1898, the Governor issued a commission in due form to said Wood to hold said office for the term of two years, commencing on January 1, 1899. On December 24, 1898, he filed his bond in due form, and took and subscribed the oath of office as required by law. On January 2, 1899, he duly demanded of appellant the possession of said office, with which demand appellant refused to comply, and excluded Wood from said office. At the time of the election of said Wood he was and at all times since has been eligible to hold said office. The trial court held that Wood was entitled to said office, and rendered judgment ousting appellant therefrom.

Appellant insists that section 1 of an act approved March 8, 1897 (Acts 1897, p. 288), which provides "that the term of county treasurer shall begin on the first day of January next following the term of the present incumbent," referred to the two years term of office of the person in office when the act took effect, which in this case was Holdeman; that the word "term," used in said section, refers to the office, and not to the incumbent, and means the fixed period of two years for which the office may be held by one elected thereto, and that the removal of Holdeman in 1897, did not change or reduce

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said term; that the term for which Holdeman was elected expired January 9, 1899, and the 1st day of January following would be January 1, 1900, and therefore that when Wood was elected in 1898, his term of office did not begin until the 1st day of January, 1900. If this insistence of appellant is correct, the trial court erred in adjudging that Wood's term of office commenced January 1, 1899.

The office of county treasurer was created by the Constitution, and the term fixed at two years and until his successor is elected and qualified. Section 2, article 6, and section 3, article 15, of the Constitution of 1851, being sections 152, 225 Burns 1894, sections 152, 225 Horner 1897; *Scott v. State, ex rel.*, 151 Ind. 556, and cases cited. The Constitution fixes the length of the term of office, but not when it shall commence.

At the first session of the General Assembly after the adoption of the Constitution of 1851, it was enacted "that the term of office of county treasurer shall commence at the expiration of the term of the present incumbent," (1 G. & H. Stat. 640), and this provision was reenacted in 1865. Acts 1865, p. 62, being section 7989 Burns 1894, section 5911 Horner 1897. At said first session of the General Assembly it was enacted that boards of county commissioners were authorized to fill all vacancies in county offices not otherwise provided for, and that "such appointment should expire when a successor is elected and qualified, who shall be elected at the next general election." Section 7579 Burns 1894, section 5563 Horner 1897.

In *Beale v. State, ex rel.*, 49 Ind. 41, it was held under said acts that, when a county treasurer, whose term would have expired on August 26, 1875, vacated his office on September 4, 1874, a person appointed on the same day could only hold until his successor was elected and qualified, and that the person elected treasurer at the general election of 1874 was, on being qualified, entitled to the office. It was contended in that

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*Weaver v. State, ex rel.*

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case that section 1 of the act of 1865, being section 7989, 5911, *supra*, fixed the commencement of the term of the person elected in 1874 at the expiration of the regular term, which was August 26, 1875. But the court held that he was, upon being qualified, entitled to the office. This was upon the ground that the term of the person in office when the general election of 1874 was held, he being appointed to fill a vacancy, was, under section 7579, 5563, *supra*, until his successor was elected and qualified; in other words, that section 7989, 5911, *supra*, must be applied to the term of office of the person in office at the time when the general election is held at which the successor is elected. If we apply this rule to this case, it is clear that the term of Wood as treasurer commenced January 1, 1899.

The object of the act of 1897 was so to change the law that the terms of all county treasurers in the State, whether elected in 1896 or at any general election thereafter, should commence on the 1st day of January; and this day was fixed because it was thought that less complication in the business affairs of the county would be caused by a change of treasurers on that day than on any other day of the year. Said act is a general law, not only to fix the time for the commencement of the terms of treasurers elected in 1896, whose terms had not commenced when said act took effect, but also the commencement of the terms of all treasurers elected thereafter.

At the time said act took effect, in March, 1897, the terms of a large number of the treasurers, elected at the general election of 1896, had not commenced, because the terms of those whom they were elected to succeed had not expired. In reading said act of 1897 to determine when the terms of such treasurers should commence, the words, "the term of the present incumbent," mean the term of the treasurers elected at the general election of 1894 whose terms had not expired when said act took effect; that is, it must be applied to the conditions existing at that time to determine when the terms of such treasurers commence.

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By virtue of the provision of said act, the commencement of the terms of the treasurers elected in 1896, who were not in office when said act took effect, was postponed until the 1st day of January following the expiration of the terms of "the present incumbents," being the terms of those elected in 1894, and whose terms had not expired when the act took effect. *Scott v. State, ex rel.*, 151 Ind. 556; *State, ex rel., v. Harris, post*, 699. If a treasurer elected in 1894 had died or resigned after the election of 1896, and before the expiration of his term, whether before or after the act of 1897 took effect, the person appointed to fill said vacancy would have held for the unexpired term of the person whom he was appointed to succeed; and, if such appointee had been in office when said act of 1897 took effect, the term of the person elected treasurer at the general election of 1896 would not have commenced until the 1st day of January after the expiration of the term of the person elected treasurer in 1894 and the appointee would have held until that time. *State, ex rel., v. Long*, 91 Ind. 351. The words, "the term of the present incumbent," in said act, therefore only applied when it took effect to the terms of such treasurers as would expire before the next general election, and not to such as would hold beyond the next general election. Holdeman being elected at the general election of 1896, and having taken his office before said act took effect, his term of office extended beyond the election of 1898, and said act, when it took effect, did not speak as to his term of office or apply thereto at that time. To determine when the term of said Wood commenced, said act must be applied to the conditions existing at the time of his election, and not at the time the act took effect. Appellant was appointed to fill the vacancy caused by the removal of Holdeman, before the election of 1898, and, as provided by section 7579, 5563, *supra*, his term of office was until his successor was elected and qualified. Appellant was therefore "the present incumbent" when Wood was elected at the general election of 1898 to

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succeed him. As the term of office of Wood could not commence until the 1st of January after the expiration of the "term of the present incumbent" (appellant), which was January 1, 1899, appellant was entitled to hold until that time, and no longer. *Scott v. State, ex rel.*, 151 Ind. 556; *State, ex rel., v. Harris, supra*. Said act did not and does not change the time for the expiration of the term of any treasurer elected or appointed by lengthening his term or otherwise. It merely fixes the time for the commencement of the terms of all treasurers elected by the people, and if any treasurer holds beyond the time for which he was elected or appointed, it is either under the provisions of section 3, article 15, of the Constitution (being section 225 Burns 1894, section 225 Horner 1897, or section 7579, 5563, *supra*. It follows, therefore, that under said act of 1897, and section 7579, 5563, *supra*, and the provisions of the Constitution, the terms of all county treasurers elected by the people commence with the 1st day of January, and that the terms of all, whether elected at a general election or appointed to fill a vacancy, expire with the 31st day of December. Judgment affirmed.

Baker, J., took no part in the decision of this cause.

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 LAYMAN v. HUGHES ET AL.
 

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[No. 18,390. Filed Nov. 29, 1898. Rehearing denied April 21, 1899.]

**HIGHWAYS.—Construction of Free Macadamized Road.—Irregularities in Making Assessments.—Injunction.—Collateral Attack.**—A suit to enjoin a county treasurer from collecting assessments to pay the expenses for the construction of a free macadamized road, being a collateral attack, mere irregularities and defects in making the assessments cannot be inquired into. *pp. 485-487.*

**SAME.—Suit to Enjoin Collection of Assessments for Construction of Free Macadamized Road.—Complaint.**—A complaint to enjoin the collection of assessments for the construction, under the act of March 3, 1877, of a free macadamized road, alleging that plaintiff's lands had not been reported by any engineer, or by viewers, as benefited, is insufficient without a further allegation as to what the



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record of the board of county commissioners discloses on the subject; since ample authority is conferred upon such commissioners to make all needed corrections and supply all omissions. pp. 987-489.

From the Putnam Circuit Court. *Affirmed.*

G. C. Moore, T. T. Moore and S. D. Coffey, for appellant.

F. D. Ader and H. H. Mathias, for appellees.

MCCABE, J.—The appellant, Layman, sued the appellee, Hughes, as treasurer of Putnam county, to enjoin the collection of certain assessments upon appellant's land to defray the expense of the construction of the Mt. Meridian and Putnamville free macadamized road. The other appellees, who were defendants below, filed cross-complaints setting up the same facts substantially set forth in the complaint; the only difference being that each cross-complaint refers to the land owned by such cross-complainant, and assessed for such road, instead of the land owned by the plaintiff. Each defendant filed a separate cross-complaint. Demurrers to the complaint and to each cross-complaint were sustained for want of sufficient facts, and, the plaintiff and cross-complainants failing to amend or plead further, judgment was rendered that the plaintiff and cross-complainants take nothing by the complaint or cross-complaints. These rulings are called in question by the assignments of error. There are eighteen separate assignments of error under different titles. The first one makes the plaintiff below the sole appellant, and the defendants below, or cross-complainants, appellees. In the other seventeen assignments, one or more of the cross-complainants are made appellants, and the balance of them are made appellees, along with the plaintiff below.

This being a vacation appeal, the proper parties are required to be made. All of the parties to the appeal are made both appellants and appellees. And, unless we regard this as eighteen separate appeals, which is not authorized in one transcript, we would probably be justified in dismissing the

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appeal. We held in *Gregory v. Smith*, 139 Ind. 48, that the same party cannot be both appellant and appellee. But, as it is not discussed or noticed in the argument, we will not pass upon it.

The case of *Bowen v. Hester*, 143 Ind. 511, was an action to enjoin the collection of assessments made by the same order of the board of commissioners, and for the same irregularities relied on in this action, but by different landowners from those involved here. The record shows that the trial court was controlled in sustaining the demurrers by the law as declared in that case. We held in that case that the defects in the proceedings of the board were mere irregularities that did not affect the jurisdiction of the board and that the record showed that it had complete jurisdiction and that its orders and judgment, in establishing the road and making the assessments, could not be collaterally impeached by an injunction.

In one of the briefs of appellant's counsel it is substantially conceded that that case is decisive of this, but it is contended that that case was wrongly decided, and ought to be overruled. It is contended that that case is in conflict with *Fulton v. Cummings*, 132 Ind. 453. In the latter case, on appeal from the board to the circuit court, it was attempted to show that there were other lands not reported benefited, that were actually benefited. This offer was rejected in the circuit court, and its action affirmed in this court, because no such question was raised in the commissioners' court by attacking the report of the viewers before the board. This court there said: "Unless some such action was taken, we think the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed." It is therefore urged that the language, "the territory sought to be assessed," as used in the statute, means the lands embraced in the report of the viewers. The whole case shows that no such thought existed in making the decision. If that were so, as soon as a report of viewers is made, showing certain land

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benefited within the two-mile limit, that would end the controversy even though other lands were within the two-mile limit actually benefited, but not so reported. If the report of the viewers, leaving such actually benefited lands out of such report, excludes the jurisdiction of the board as to such omitted lands, as is contended by appellant, then such jurisdiction does not depend on facts but on mistakes. But this court there explicitly denied such a construction of the statute by saying: "We do not hold that the parties interested may not, upon the return of the report of the viewers, attack it before the board by proper pleading, upon the ground that it does not include all the land benefited, and procure new viewers and a new report; but no such question is presented here, for nothing of the kind was attempted." Now if such irregularities and defects cannot be inquired into on appeal from the board to the circuit court, simply because they were not attacked before the board, there is much greater reason why they cannot be inquired into on a collateral attack by injunction. That case is not in point here, because this is a collateral attack, and that was a direct attack by appeal, the purpose of which is in the nature of an attempt to correct errors by a trial *de novo*.

An injunction against a judgment establishing a gravel road, and making assessments therefor, proceeds upon the idea that the proceedings and judgment of the board are void. If the board had jurisdiction, its proceedings are not void, though ever so erroneous. In the other brief, on behalf of appellant, it is contended that Judges McGregor and McBride had a misconception of the purport of the opinion in *Bowen v. Hester*, 143 Ind. 511. It is said in said brief that: "It appears from the statement of the record in the case of *Bowen v. Hester*, *supra*, that the viewers amended their report so as to include the lands of appellee in that case. If this was true, of course he could not enjoin the collection of the assessment, for the viewers have the right, at any time before they are discharged, to amend their report. There-

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fore, when this court held, under this state of facts, that Hester could not enjoin, it decided all there was in the case." That case shows that the report of the viewers was made and filed before the amendment thereto was made by adding the lands in controversy; that the amendment was made by the board by adding the omitted lands. But it is contended that that case is not controlling here, because nothing of the kind appears in the complaint here. While it is alleged in a vague and indefinite manner only that appellant's lands were assessed, it is substantially averred that they had never "been reported by said engineer and viewers, or any other engineer and viewers, as benefited, and ought to be assessed to pay for the cost of said improvement." But it is not alleged what the commissioners' record states or discloses upon the subject. The complaint does allege in one place that the report of the viewers and engineer that certain lands therein described would be benefited was filed, and it did not include appellant's lands, and that such report appeared of record. So the complaint does not set forth what steps were taken by the commissioners before the order assessing appellant's lands for the improvement. It alleges that appellant's "lands were not reported, by said engineer and viewers, or by any other engineer and viewers, as benefited," but it fails to aver what the commissioners' record states as to the matter. All these averments may be true, and yet it may also have been true, as shown by the complaint in the case of *Bowen v. Hester*, 143 Ind. 511, that the board had entered of record the following order: "Comes now McChartley, auditor, and presents the report of John W. McNarry, William Broadstreet and James H. Sparks, viewers in the cause filed within, and said report is as follows, after correction made by the board from evidence submitted: \* \* \* And now comes said viewers and report the following lands and lots benefited, which said lands and lots are by the board added to the foregoing list, and after correction to stand assessed," etc.

In *Ricketts v. Spraker*, 77 Ind. 371, on 378. it is said:

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"The statute confers ample authority upon the commissioners to make all needed corrections and to supply all omissions." After quoting the statute, that case continues: "For anything that appears, the commissioners may have added to the assessment roll the lands alleged to have been omitted. The presumption is that they did their duty and placed all the lands upon the list. It was at least incumbent upon the appellants to show not only that the committee omitted lands, but that other public officers did not supply the omission." This is one of the cases on which *Bowen v. Hester*, 143 Ind. 511, is founded. This is but an application of the general doctrine to this sort of a case, and that doctrine is thoroughly settled by our decisions that a record of a judgment cannot be impeached collaterally by allegation of matters *de hors* the record, unless the complaint states what is shown by the record in relation to such matters. *Bailey v. Rinker*, 146 Ind. 129, 136, 137, and authorities there cited on this point; *Fitch v. Byall*, 149 Ind. 554-558; *Denton v. Arnold*, 151 Ind. 188. And in *Million v. Board, etc.*, 89 Ind. 5, at page 15, quoting from *Stoddard v. Johnson*, 75 Ind. 20, it is said: "The complaint charges numerous errors and defects in the reports of the original viewers, and of the committee of apportionment; as, for instance, that benefited lands had been omitted, and other tracts so defectively described as that the assessments made thereon were void. It is evident, however, that these and the like objections do not affect the jurisdiction, and, if true, constitute errors and irregularities which the law expressly authorizes the board to correct at any time."

Both of the cases last referred to were among the cases on which the decision in *Bowen v. Hester*, 143 Ind. 511, was founded. It is therefore clear that that case was correctly decided, and, even if the complaint does not show that the report of the viewers was amended and corrected by the board, in the absence of any averment in the complaint in this case as to what the record of the commissioners shows as to that matter, it is insufficient to uphold a collateral attack

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on those proceedings which this suit is; and the presumption arises that the report was so amended before the assessment complained of was made. It follows that the circuit court did not err in sustaining the demurrers. The judgment is affirmed.

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BENNETT v. SIMON.

[No. 18,684. Filed April 25, 1899.]

**APPEAL AND ERROR.—*New Trial.*—*Evidence Not in Record.*—**An assignment of error, in overruling a motion for a new trial, will not be reviewed, where the causes assigned for a new trial depend upon the evidence which is not brought into the record. *pp. 490, 491.*

**PRACTICE.—*Motion for Venire De Novo.*—*When Made.*—**A motion for a *venire de novo* made after the rendition of the judgment cannot be considered. *p. 491.*

**WILLS.—*Construction.*—*Devise.*—**Where by the terms of a will it is clear that the testator intended to devise all of a tract of land to certain persons, and the tract is found to contain more acres than the will calls for as shown by the sum of the acres devised to the different persons, the excess will be apportioned among the devisees in proportion to the number of acres named for each in the will. *pp. 491-493.*

**SURVEY.—*Appeal.*—*Burden of Proof.*—**The one who appeals from a survey of land, under section 5955 Horner 1897, has the burden of showing that the survey appealed from was incorrect. *p. 493.*

From the Warrick Circuit Court. *Affirmed.*

*E. J. Crenshaw* and *W. Z. Bennett*, for appellant.

*C. W. Armstrong* and *A. R. Kiper*, for appellee.

**MONKS, C. J.**—This was an appeal taken by appellant from a survey of real estate under section 8035 Burns 1894, section 5955 Horner 1897. The court tried the case on the last day of the December term of said court, and made a special finding of facts, and stated conclusions of law thereon sustaining the survey, and rendered judgment accordingly. On March 7, 1898, the first day of the next term of the court below, appellant filed a motion for a new trial, which was overruled by the court. Before said motion for a new

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trial was overruled, appellant filed a motion for a *venire de novo*, which was overruled. The errors assigned call in question each conclusion of law, and the action of the court in overruling the motion for a new trial, and the motion for a *venire de novo*. No attempt has been made to bring the evidence into the record. As the causes assigned for a new trial depend entirely upon the evidence, no question concerning the action of the court in overruling the motion for a new trial is presented. *Ayres v. Armstrong*, 142 Ind. 263. As the motion for a *venire de novo* was made after the rendition of the judgment, it came too late. To present any question, such motion must precede the rendition of the judgment. *Potter v. McCormack*, 127 Ind. 439, 440; *Shaw v. Merchants Nat. Bank*, 60 Ind. 83, 94.

It appears from the special finding that both parties trace their title to the same source, Samuel P. Hinman, who died testate in 1884, the owner of a tract of land. By his will he devised to his wife a life estate in all his real estate, "consisting of one hundred acres where I now live." The fee simple of said real estate he devised, forty acres to his son Jacob, his son Jonas twenty acres, and his daughters Lora, Harriet, and Ollie, thirteen and one-third acres each, making forty acres for the daughters; Jacob's portion to be taken from the west side of said real estate. Jacob Hinman took immediate possession of what he supposed was devised to him, bounded on the west and south by highways, and on the east by the lands devised to Jonas, Lora, Harriet, and Ollie. He built a fence along the east line of the north half of said real estate, about, if not exactly sixty-four rods from the west line of said tract, the south part of the east line remaining unfenced. Afterwards, in 1887, Jacob Hinman sold and conveyed the tract of land devised to him to appellee, who took possession thereof. Afterwards a fence was built, commencing at the south end of the fence built by Jacob Hinman, and bearing gradually to the west, until at the south line the same lacked forty-three links of being sixty-four rods east of the

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west line of said tract. It is not shown who built this fence. The twenty acres devised to Jonas were conveyed to him so that the part for the daughters abutted the tract devised to Jacob Hinman on the east, and extended the same distance north and south, to wit, twenty-five and thirty-four one-hundredths chains. The daughters named sold and conveyed said tract of land to appellant. In 1872, before the death of Samuel P. Hinman, he sold and conveyed one-half acre in the part of said one hundred acres afterwards conveyed to appellee to a church corporation "to be used as a building spot and site for a church edifice, and when it ceased to be used for that purpose, said land is to revert back to said Samuel P. Hinman and his heirs." The church took possession of the land so conveyed, and erected a church house thereon, and established a cemetery thereon, and has maintained said house ever since. The surveyor established the line between the land of appellant and appellee sixty-four rods east from the west line of appellee's land. It is insisted by appellant that the corners so established gave to appellee forty and fifty-four hundredths acres, when Jacob Hinman, his grantor, was only entitled to forty acres under his father's will. This calculation, however, includes the one-half acre owned by the church, which, being deducted would leave forty and four one-hundredths acres. In the conveyances made by the devisees of Samuel P. Hinman the 100 acres is treated as being 128 rods east and west, and the tract held by appellant and appellee as being 100 rods north and south, instead of twenty-five and thirty-four one-hundredths chains. It would seem, therefore, that the land devised by Samuel P. Hinman to his children contained more than 100 acres, after deducting the one-half acre conveyed to the church. It is evident from the facts stated in the special finding, that it was the intent of the testator, Hinman, to devise to his children the land upon which he lived at the time of his death, and that he supposed the same contained only 100 acres after deducting the one-half acre conveyed to the church. He



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gave to one son forty acres, to another twenty, and to his three daughters thirteen and one-third acres each, making forty acres—in all 100 acres. If only the number of acres specified for each child is given to such child, then a part of the land owned by said testator remains undisposed of by will. Such a construction of the will is to be avoided, unless the language of the will compels it. *Groves v. Culph*, 132 Ind. 186, 188; *Mills v. Franklin*, 128 Ind. 444, 446; *Morgan v. McNeeley*, 126 Ind. 537, 538, and cases cited; *Roy v. Rowe*, 90 Ind. 54, 59. It is evident that the testator's intention was to give to said children the land upon which he lived in the proportions named in his will, and, under the rule, the excess is to be apportioned among said devisees in proportion to the number of acres named for each in the will. *Pereles v. Magoon*, 78 Wis. 27, 23 Am. St. 389, and note p. 392; 4 Am. & Eng. Enc. of Law, (2nd ed.) 868, and cases cited in note 1. For all that appears from the special finding, there was more than 100 acres in the tract devised, and the corners were placed so as to give appellee the proportion thereof belonging to his grantor.

The burden was upon appellant to show that the survey appealed from was incorrect. *Findley v. McCormick*, 50 Ind. 19. The special finding does not show that the survey is incorrect. The judgment is therefore affirmed.

ASPY ET AL. v. LEWIS ET AL.

[No. 18,587. Filed Jan. 31, 1899. Rehearing denied April 25, 1899.]

WILLS.—*Construction.—Disinheritance.*—A construction of a will which would disinherit a child or direct descendant in favor of collateral kindred, is not to be accepted unless the language of the will is such as clearly to indicate such intention. p. 495.

SAME.—*Construction.—Vesting of Estate.*—The law looks with disfavor upon the postponement of estates, and the intent to postpone must be clear and manifest, and must not arise by mere inference or construction. p. 496.

SAME.—*Construction.—Words of Survivorship.*—The words of survivorship in a will must be held to relate to the death of the tes-

152	493
159	116
152	493
160	123
152	493
166	208

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tator, rather than to the death of the first taker, if the words of the will are capable of such construction. p. 496.

**WILLS.**—*Construction.*—*Survivorship.*—*Vested Remainder.*—Testator devised his real estate to his wife so long as she remained his widow, and provided that “the above estate that is bequeathed to my wife shall be in full possession of my only daughter, Maria Louisa, at the death or marriage of my wife, provided she shall be living, and if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers and sisters.” *Held*, that the will gave a vested remainder to the daughter at her father’s death, which, at the daughter’s death before her mother, descended to her children. pp. 494-500.

From the Bartholomew Circuit Court. *Reversed.*

*W. W. Lambert, Ralph H. Spaugh, M. D. Emig, W. W. Herrod and W. P. Herrod*, for appellants.

*G. W. Cooper and C. B. Cooper*, for appellees.

**HADLEY, J.**—The complaint shows that the will of Jonas Reed was duly admitted to probate in Bartholomew county on the 10th day of July, 1843; the part thereof material to a decision of this case being in the words following: “And I also direct that the real estate of which I die seized or possessed of be disposed of in the following manner, to wit: I bequeath to my beloved wife, Elizabeth, all my real estate so long as she remains a widow, namely: The east half of the southwest quarter of section eighteen, in town ten north, of range seven east, containing eighty acres, more or less, being in the Indianapolis district; together with all the rights, privileges, and appurtenances thereto belonging. And I direct further that the above estate that is bequeathed to my wife shall be in the full possession of my only daughter, Maria Louisa, at the death or marriage of my wife, provided she shall be living; and if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers and sisters or their heirs.”

The testator left surviving him his wife, Elizabeth Reed, and his daughter, Maria Louisa Reed, and several brothers and sisters. His wife and widow, Elizabeth, never remar-

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ried, and died in 1897. His daughter, Maria Louisa, intermarried with John Aspy, had children, and died before her mother, Elizabeth Reed.

This suit is for partition and to quiet title. Appellants' separate demurrers were overruled to the complaint, which presents the only question for decision. The appellants (defendants below) are the widower and children of Maria Louisa, deceased, and claim title through her by virtue of the will of Jonas Reed, on the theory that Maria Louisa took a fee simple; and appellees, who are the brothers and sisters, and their descendants, of Jonas Reed, claim title through the will by virtue of the fact that Maria Louisa, the daughter, died before her mother, and on the theory that Maria Louisa took only a contingent remainder under the will. The real question, therefore, raised by the assignments of error is, in whom is the title, the heirs of Maria Louisa, the daughter, appellants herein, or in the brothers and sisters and their heirs, appellees herein?

It has been said that the intent of the testator must be the polar star in the construction of a will. Among the rules of construction is that which springs from our human nature, when engaged in the serious and solemn business of making a final disposition of property, and when natural affection for wife and children has the most impartial and sincerest sway. In such moments it is presumed that the testator will have a just and tender regard for those dependent ones, who are the natural recipients of his bounty, and whose future comfort and happiness have the promptings of his affection. Hence it is that no construction of a will is to be accepted that disinherits a child or direct descendant in favor of collateral kindred, unless the language of the will is such as clearly to indicate such intention. In a recent well considered case the court said: "An heir cannot be disinherited unless the intention to disinherit be expressed, or is to be clearly and necessarily implied. When one construction of an ambiguous will leads to a disinheritance of the heir, and another

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favorable to the heir, the latter construction must be adopted." *Crew v. Dixon*, 129 Ind. 85.

Another rule of construction is that the law looks with disfavor upon the postponement of estates, and the intent to postpone must be clear and manifest, and must not arise by mere inference or construction. "And the law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested." *Doe v. Considine*, 6 Wall. 458-475; *Bruce v. Bissell*, 119 Ind. 525-530; *Heilman v. Heilman*, 129 Ind. 59-64. "It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary." *Doe v. Considine, supra*; *Heilman v. Heilman, supra*; *Amos v. Amos*, 117 Ind. 19-37; *Harris v. Carpenter*, 109 Ind. 540.

Another principle of construction correlative to the one just stated, is that words of survivorship must be held to relate to the death of the testator, rather than to the death of the first taker, if the words of the will are capable of such construction. This doctrine is in aid of a vested, as against a contingent, remainder.

In the case of *Harris v. Carpenter*, 109 Ind. 540, the will, so far as it relates to the question here presented, is as follows: "Item 2. I further give and devise to her, (widow), in lieu of her interest in my lands, the following part and parcel of the farm \* \* \* on which we now reside, bounded and described as follows, to wit: \* \* \* She my said wife, to have the same after my death for and during the period of her natural life; and at her death the same shall be the property of and pass to my daughter, Laura Carpenter, \* \* \* in fee; but if she, said Laura, be not living, then to her heirs forever." Concerning which the court said, "Construing the will before us in the light of the foregoing authorities, we have reached the conclusion that the survivorship provided for in the last clause of the second

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item had reference to the time of the death of the testator, and that upon his death Mrs. Carpenter became seized of a vested remainder in fee in the land devised by that item of the will."

In *Hoover v. Hoover*, 116 Ind. 498, the will under consideration provided that certain lands should go to the widow of testator "for and during her natural life, and, at her death, said real estate to pass in fee simple, in equal portions, to my son, Andrew, and my daughter, Hattie. The east half of said farm to go to my son, Andrew, if he be living, and if he be dead, then to his widow." Mitchell, J., speaking for the court, said: "Accepting the position as established, that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that, in the absence of a contrary intent, a will always speaks as from the date of the testator's death, there can be no doubt but that Andrew took an estate in fee simple in remainder, which vested immediately upon the death of his father."

The same principle is reaffirmed and followed in the following cases: *Heilman v. Heilman*, 129 Ind. 59; *Wright v. Charley*, 129 Ind. 257; *Borgner v. Brown*, 133 Ind. 391.

In *Fowler v. Duhme*, 143 Ind. 248, the testator, Moses Fowler, devised the residuum of his real estate to his three children upon condition, namely:

"(a) In the event of the death of any of my said children without lawful issue *living at the time of the death of such child*, then the share of such deceased child shall vest in, \* \* \* such of my said children as shall then be living." This court, in a very elaborate opinion, and upon review of many authorities of this and other states, concluded that the death intended, related to one occurring in the lifetime of the testator, and not to one occurring after his death.

In this, and many other cases of its class, it is conceded that the application of the rule contended for is often repugnant

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to the simple import of the words used; but, keeping the intent of the testator as the central thought, the common import of words must yield to well established rules of construction, if thereby the general intent of the testator, as gathered from the whole will, may be consistently maintained. Courts do not close their eyes to the fact that in the preparation of wills words are often carelessly used, and without an adequate sense of their legal effect, and without a mental grasp of all the conditions that may arise affecting the bequest, and when an inaccuracy is apparent, or even doubtful, courts, to prevent miscarriage of testamentary intent, generously interpose such rules of construction as time and experience have approved. Some of these salutary and pertinent rules are aptly and succinctly stated in *Moore v. Hare*, 144 Ind. 573, as follows: "It is settled law that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that in the absence of contrary intent a will always speaks as from the testator's death." \* \* \* "The law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of such an estate. In the absence of a clear manifestation of the intention of the testator to the contrary, an estate will be held to vest at the earliest possible period. The intent to postpone must be clear and manifest, and must not arise by mere inference or construction."

The will of Stoughton Fletcher gave to his daughter, Mrs. Ritzinger, certain real estate for life, with provision that at her death said real estate "shall go to her children in fee. If any child of hers shall have died, leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child or children." And applying the rules above stated, the court adds: "There being no manifest intent to the contrary, it will be presumed that the clause providing that at the death of Mrs. Ritzinger the real

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estate devised shall go to her children in fee simple relates to the beginning of the enjoyment of the remainder, and not to the vesting of that estate, and that the clause 'if any child of hers shall have died leaving a child or children' has reference to a death during the lifetime of the testator." The principles announced in this case have the uniform approval of many decisions of this State, and cannot now be open to controversy. Applying them to the will under consideration, we are irresistibly led to the conclusion that the survivorship of Maria Louisa related to the death of the testator, and not to the death of the life tenant. Can it be said that Jonas Reed intended by his last will to disinherit his grandchildren—the children of his only daughter—in favor of his brothers and sisters and their children? The testator devised all his real estate to his wife for life, "and I direct further that the above estate that is bequeathed to my wife shall be in the *full* possession of my only daughter, Maria Louisa, at the death or marriage of my wife." From the use of the term "*full* possession" at the death of her mother is implied that the testator meant that his daughter should have some sort of interest in the property before the death of her mother—some right short of full possession—until the happening of that event. There can arise no doubt but the testator intended to devise the whole estate in his farm to his wife and only daughter; to his wife, the use and enjoyment during her life, and, upon her death, the full possession—that is, the full enjoyment of the estate in fee—to his daughter. The proviso, paraphrased, reads thus: "Provided she (my daughter) shall be living, and, if she is not living at my death, at the death or marriage of my wife then the estate to go to my brothers and sisters or their heirs." If it may be said from the words used that the time of survivorship of the daughter is doubtful, the well established rules of construction require us to construe the words referring to the death of the daughter to relate to the death of the testator, and the clause, "at the death or marriage of my wife then

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the estate to go to the use of my brothers and sisters or their heirs" to relate to the vesting of the remainder in the brothers and sisters at the death of the testator, contingent upon the death of Maria Louisa prior to that time. Such a construction accords with legal principles. It is invoked by a common sense of natural justice. It responds to the sentiment of natural affection borne by a parent to his offspring. It secures the inheritance to direct descendants. It asserts a vested remainder as against an executory devise. It secures the vesting of the estate at the earliest possible period.

Judgment reversed, and cause remanded, with instructions to sustain each of the separate demurrers of appellants to the complaint.

## MYERS v. GIBSON.

[No. 18,610. Filed April 26, 1899.]

COUNTY.—*Claims.*—*Jurisdiction of Board of Commissioners.*—The filing of a claim against a county with the auditor, and his presenting the same to the board of county commissioners, is all that is required to give the board jurisdiction to act thereon. p. 502.

SAME.—*Claims.*—*Allowance.*—*Appeal.*—Where the board of county commissioners had jurisdiction in the allowance of a claim, an appeal vacates the allowance and the cause stands for trial *de novo*. p. 502.

SAME.—*Claims Refiled After Disallowance.*—*Jurisdiction of Board of Commissioners.*—Where a claim against a county for work and material was filed with the board of commissioners, and by them disallowed, and no appeal was taken, the board at a subsequent session had no jurisdiction to allow a claim presented for the same work and material. p. 503.

SAME.—*Claims.*—*Jurisdiction of Board of Commissioners.*—*Appeal.*—Unless the board of county commissioners has jurisdiction to act on the merits of a claim presented, the circuit court, on an appeal from an allowance by such board, will not have jurisdiction to render judgment against the county. p. 506.

From the Miami Circuit Court. *Reversed.*

*Enoch Myers* and *J. F. Lawrence*, for appellant.

*I. Conner, J. Rowley, W. C. Bailey, C. A. Cole* and *Mitchell, Antrim & McClintock*, for appellee.

152	500
156	382
162	500
157	453
157	454
158	500
158	473
152	500
167	156



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MONKS, C. J.—Appellee, on June 1, 1897, filed with the auditor of Fulton county a claim, on account of the sub-basement under the court-house, for \$19,996.42, in which the work and labor done and material furnished were specifically itemized. On August 13, 1897, he filed a claim for \$20,000 “for basement under court-house.” At the September term, 1897, of the board of commissioners of said county, said claims which were for extra work in the basement of the court-house were examined by the board, and appellee was allowed \$18,624.17 thereon. Appellant, a taxpayer of said county, made the proper affidavit, and appealed to the circuit court from said allowance. On application of appellee the venue was changed to the court below, where an amended answer in two paragraphs, denying the jurisdiction of the board of commissioners, duly verified, was filed by appellant. The first paragraph shows that a claim for the same work and material had been filed by appellee with, and disallowed by the board of commissioners of Fulton county in 1896, and that no appeal had been taken by appellee from the decision of said board disallowing said claim; nor had he ever brought any action against the board of commissioners of Fulton county on said claim or account, except to file the claim for the same work and material with the auditor of Fulton county for presentation to the board of commissioners for allowance, which said board allowed at \$18,624.17, and from which allowance this appeal was taken. The second paragraph of said answer, denying the jurisdiction of the board of commissioners, alleges that when said claim was allowed by the board of commissioners at \$18,624.17, from which allowance of the board appellant appealed, no competent proof thereof was adduced before said board in favor or in support thereof, as is required in other courts; nor was the fact, if it be a fact, that the truth of such charges was known to the board of commissioners, entered of record in the proceedings of said board about said claim. Demurrer for want of facts was sustained to said answer to the jurisdiction, and

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appellant set up the same facts in bar of the action, to which a demurrer for want of facts was sustained; and appellant refusing to plead further, the court rendered judgment against Fulton county for \$20,462.98, and for cost against appellant.

Appellee insists that the first paragraph of the verified amended answer, denying the jurisdiction of the board, did not show that said board had jurisdiction to act on the claim disallowed in 1896, and that it was therefore insufficient, and the demurrer thereto was properly sustained. The first paragraph of said answer to the jurisdiction alleged that the claim set out in said paragraph, for material furnished and work and labor done, in the construction and completion of the new court-house recently erected by appellant at Rochester, in Fulton county, Indiana, was filed with the county auditor, and by him presented to the board of commissioners while in lawful session, and that the same was disallowed by the board. The filing of the claim set out in said paragraph with the auditor, and his presenting the same to the board, was all the statute required to give the board jurisdiction to act thereon. The fact that the claim as filed in 1897 was more specific than the one acted upon in 1896 is immaterial, as it is alleged that they were for the same work and material.

The second paragraph of the amended answer to the jurisdiction was clearly bad. Even if the facts stated in said paragraph show that said allowance was void, on account of the failure of the board of commissioners to comply with the requirements of section 7848 Burns 1894, section 5761 Horner 1897, which we need not and do not decide, they do not show that the board did not have jurisdiction to act upon the claim; and as the allowance was vacated by the appeal, and no longer existed, the claim, so far as shown by said paragraph, was pending in the court below for trial *de novo*. *State, ex rel. v. Brewer*, 64 Ind. 132; *Wright v. Wetson*, 95 Ind. 408, 410, 411.

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The controlling question presented by this appeal is whether the board of commissioners of Fulton county, after having disallowed said claim, had the power at a subsequent session—appellee having filed a claim for the same work and labor—to allow the same. By the act of 1879, Acts 1879, p. 106, being section 5758, 5759, 5760, 5769, R. S. 1881, it was provided, in substance, that any person who should thereafter have a legal claim against any county should file the same with the county auditor, to be by him presented to the board of commissioners, and the commissioners were required to examine the claim and allow or disallow the same in whole or in part, as they may find it just and owing. Any person or corporation feeling aggrieved with the decision was allowed an appeal to the circuit court. It was also provided, by section four of said act, being section 5760 R. S. 1881, section 7847 Burns 1894, that, "No court shall have original jurisdiction of any claim against any county in this State in any manner except as provided for in this act." It is clear that under said act of 1879, being section 5758, 5759, 5760, 5769 R. S. 1881, boards of commissioners had exclusive original jurisdiction of all claims against the county, and that no court could acquire jurisdiction of a claim against the county except by appeal from the decision of the board. It was uniformly held under said act that when a claim was filed before a board of commissioners, and disallowed in whole or in part, the only remedy of the claimant was to appeal from the action of the board. No independent suit could be maintained on said claim in any court, nor could the claimant again file the claim before the board and be entitled to an allowance of the same in whole or in part. *Bass Foundry, etc., v. Board, etc.*, 141 Ind. 68; *State, ex rel., v. Board, etc.*, 101 Ind. 69; *Maxwell v. Board, etc.*, 119 Ind. 20; *Board, etc., v. Maxwell*, 101 Ind. 268; *Pfaff v. State, ex rel.*, 94 Ind. 529; *Board, etc., v. Appelwhite*, 62 Ind. 464.

In 1885 (Acts 1885 p. 80), section three of the act of

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1879, being section 5769 R. S. 1881, was amended, so that since said amendment, being section 7856 Burns 1894, section 5769 Horner 1897, if the claim is disallowed in whole or in part, the claimant may either appeal therefrom, or bring an action on said claim against the county in its corporate name. *Bass Foundry, etc., v. Board, etc.*, 115 Ind. 234, 239, 240; *Myers v. Gibson*, 147 Ind. 452, 456. The only change made by the amendment of 1885 was to give a claimant, in addition to his right of appeal, the right to bring an action on the claim against the county in its corporate name. So that, after the taking effect of the amendment of 1885, the claimant, if his claim was disallowed in whole or in part, had two remedies, instead of one, as under the act of 1879. Before the taking effect of said act of 1879, a claimant could sue the county in the first instance, or he could file his claim before the board of commissioners, and, if the same was disallowed in whole or in part, he could appeal or bring an independent action on the claim. *Bass Foundry, etc., v. Board, etc.*, 115 Ind. 234, 238, and cases cited; *Board, etc., v. Ford*, 27 Ind. 17.

In *Board, etc., v. Applewhite*, 62 Ind. 464, which was decided before the act of 1879, a claimant filed his claim before the board of commissioners of Jackson county, and the same was allowed in part. He did not appeal therefrom or commence an action on said claim in the circuit court, but afterwards filed a claim for the same thing, which the board disallowed, and the claimant appealed to the circuit court, where, upon a trial, the court rendered judgment on said claim against the board of commissioners of Jackson county. On appeal, this court held that when the claimant filed his claim against the county and the same was disallowed in part, he might have sued the county in a court having competent jurisdiction, or he might have appealed from the action of the board, but that he was not entitled to any allowance on said claim when he again filed the claim before the board, and that the circuit court erred in rendering judgment in his

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favor on said claim. What was decided in said cause applies with equal force to the act of 1879 and the law as it now exists. It would seem from what we have said, and the authorities cited, that under the laws now in force, after a claim has been once acted upon by a board of commissioners, said board has no jurisdiction to act upon the same claim at any subsequent session.

Counsel for appellee admit that, under the earlier decisions of this court, when it was held that the board of commissioners in allowing or disallowing claims against the county acted in a judicial capacity, and that the same was *res adjudicata*, the rule above stated was correct. But they insist that in *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192, it was held that the board of commissioners in passing upon a claim against the county does not act in a judicial, but in an executive or administrative capacity, and that therefore the rule stated no longer prevails. While it may be true, under the law as now held by this court that the allowance or disallowance of a claim against a county by the board of commissioners is not a judgment in the ordinary sense of that word, yet it does not necessarily follow for that reason that when a board of commissioners has acted upon a claim, it has jurisdiction to act upon a claim for the same thing at a subsequent session, and rescind or set aside the former action of the board. Whether the allowance or disallowance of a claim against the county is a judgment, or only the exercise of an executive or administrative power by the board, is not material to the question before us, for the reason that in either case the result is the same.

It is settled law that a board of commissioners in this State has no powers, except such as are expressly given by statute, and such as are necessary to the exercise of the powers expressly given; and the powers so given are limited and must be exercised in the manner provided by statute. *Myers v. Gibson*, 147 Ind. 452, 454, and cases cited; *Board, etc., v. Pollard*, 17 Ind. App. 470, 479, and cases cited. There is

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It is settled law that a board of commissioners in this State has no powers, except such as are expressly given by statute, and such as are necessary to the exercise of the powers expressly given; and the powers so given are limited and must be exercised in the manner provided by statute. *Myers v. Gibson*, 147 Ind. 452, 454, and cases cited; *Board, etc., v. Pollard*, 17 Ind. App. 470, 479, and cases cited. There is

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no statute conferring upon boards of commissioners the power to act upon a claim against the county, if they have already at a previous session acted upon a claim for the same thing filed by the same claimant; nor is such a power necessary to the exercise of any power expressly given boards of commissioners. The statute has provided an orderly method for collecting all claims against a county by filing the same before the board of commissioners, and by appeal therefrom to the courts, or by instituting an independent action therefor in the courts after such disallowance. Section 7856 Burns 1894, provides: "If a claim be disallowed in whole or in part \* \* \* the claimant may appeal, or, at his option, bring an action against the county." The statute having provided this remedy, all others are excluded.

When the board of commissioners disallowed appellee's claim in 1896, he had the choice of two remedies, and two only, one was to appeal to the Fulton Circuit Court, and the other was to bring an independent action in that court. *Board, etc., v. Pollard, supra*, 480. Instead of pursuing the course pointed out by statute, appellee filed his claim, giving a more specific statement of the items and dates, for the same work and labor that had been disallowed by the board in 1896, which was presented to and allowed by the board, and from which appellant appealed. Under such circumstances, the board had no jurisdiction to act upon the merits of the claim. *Ryan v. County of Dakota*, 32 Minn. 138, 19 N. W. 653; *Commissioners' Court v. Moore*, 53 Ala. 25. Neither had the circuit court any jurisdiction to act on the merits of the claim and render judgment against the county, for the reason that on appeal the jurisdiction of such court to try the cause upon its merits depends upon whether the tribunal from which the appeal was taken had jurisdiction. *Millisor v. Wagner*, 133 Ind. 400, 403; *Kiphart v. Brennemen*, 25 Ind. 152; *Jolly v. Ghering*, 40 Ind. 139; *Palmer v. Fuller*, 22 Ind. 115; *Mays v. Dooley*, 59 Ind. 287;



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*Horton v. Sawyer*, 59 Ind. 587; *Pritchard v. Bartholomew*, 45 Ind. 219.

It follows that the court erred in sustaining the demurrer to the first paragraph of the verified amended answer denying the jurisdiction of the board of commissioners.

Judgment reversed, with instructions to overrule the demurrer to said paragraph, and for further proceedings not in conflict with this opinion.

UDELL, BY NEXT FRIEND, v. THE CITIZENS STREET RAILROAD COMPANY.

[No. 18,164. Filed Feb. 15, 1899. Rehearing denied April 28, 1899.]

**APPEAL AND ERROR.—Special Verdict.—Practice.**—Available error cannot be predicated as to the ruling of the court upon plaintiff's objection to defendant's request for a special verdict, where the objection was only to "the filing of the defendant's request for a special verdict," and no demand was made by plaintiff for a general verdict, either before the introduction of evidence, or afterwards, and no objection was made to the special verdict after the return thereof, and no motion was made for a *venire de novo*. pp. 509, 510.

**STREET RAILWAYS.—Injuries to Trespasser.**—Plaintiff, a boy eight and one-half years of age, being unable to get into an open electric street car on account of the crowded condition thereof, stood on the side of the car not intended for passengers, and on which strips were placed to prevent the ingress or egress of passengers, with his feet on the boxing of the axle, and held on to a portion of a seat with his hands. He rode in a stooped position three-fourths of a mile, when, being unable to retain his hold, he fell and was run over by the wheels of the car, and injured. None of the employees of the train saw the boy hanging on the car when it was in the act of starting nor while under way, but might have seen him, if they had made an examination of that part of the car. Plaintiff did not pay his fare, but intended to do so when called upon. *Held*, that plaintiff was not a passenger upon defendant's cars, to whom it owed the duty of safe carriage and immunity from injury. pp. 510-513.

**SAME.—Injuries to Trespassers.—Infants.—Special Verdict.**—Where the special verdict in an action against a street railway company for personal injuries shows that plaintiff was wrongfully upon the car at the time of the injury, the fact that he was only eight and one-half years of age did not make him any less a trespasser. p. 513.

152	507
155	438
152	507
161	94
162	468
162	460

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**STATUTES.**—*Title.*—*Constitutional Law.*—*Special Verdict Law.*—The act of March 11, 1895, amending the practice act, and providing for special verdicts, entitled "An act to amend section 889 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881," sufficiently expresses the subject in the title. *pp.* 514, 515.

**SPECIAL VERDICT.**—*Constitutional Law.*—*Right of Trial by Jury.*—The act of March 11, 1895, amending the practice act, and providing for special verdicts, is not unconstitutional, as violating the right of trial by jury. *p.* 515.

**INTERROGATORIES TO JURY.**—*Practice.*—No error was committed in refusing to submit certain interrogatories to the jury prepared and tendered by counsel, where the interrogatories submitted covered every material question of fact in the case. *p.* 516.

**INSTRUCTIONS.**—*Special Verdict.*—Where a special verdict is requested no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict and the facts to be found therein. *pp.* 516, 517.

From the Marion Superior Court. *Affirmed.*

*William V. Rooker*, for appellant.

*W. H. H. Miller* and *John B. Elam*, for appellee.

**DOWLING, J.**—Action for damages for a personal injury sustained by the infant appellant. There were two trials of the cause in the Marion Superior Court, the first resulting in a disagreement of the jury. On the second trial, upon the request of appellee in writing, made before the introduction of any evidence, the court, agreeably to the requirements of the act of 1895, directed the jury to return a special verdict. Such special verdict was prepared by counsel on either side of the cause, was submitted to the court for revision, and was in the form of interrogatories properly framed. The court gave to the jury only such general instructions concerning their duties as are suitable where a special verdict is requested, and refused to give certain special instructions tendered on behalf of appellant.

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On the return of the special verdict, appellant moved for judgment in his favor upon it, which motion was overruled. He also filed a motion for a new trial, and the court overruled it. Judgment was thereupon rendered for appellee on its motion. Exceptions to these rulings were saved by appellant.

The errors discussed by appellant's counsel in their briefs, and orally, are the ruling of the court on appellant's objection to appellee's request for a special verdict; the rulings on the motions for judgment on the special verdict; and the decision of the court on the motion for a new trial.

The first of these errors is not available to appellant for the reason that no question touching the same is properly presented for the determination of the court. The appellee having filed its request for a special verdict, appellant filed his objection to it in these words, (title omitted): "The plaintiff objects to the filing of the defendant's request for a special verdict herein, for the reason that the same is filed pursuant to the act of March 11, 1895, concerning proceedings in civil cases, which act is unconstitutional and void, for the reason that it deprives the plaintiff of the right of trial by jury upon the issues as joined in the complaint and answer, and requires the jury to take from the court, and not from the pleadings, the questions to be decided by the jury."

It will be observed that the objection was only to "the filing of the defendant's request for a special verdict." No demand was made, either before the introduction of the evidence, or afterwards, that the jury be directed to bring in a general verdict. On the return of the special verdict no objection was made to it by appellant, nor was there at that time a request that the jury be sent back with instructions to make a general verdict. No motion was made for a *venire de novo*. If counsel for appellant thought they were entitled to a general verdict, they should have asked for it at the right time, and in the proper manner. If they thought the verdict returned by the jury was not the proper one, or

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that it was imperfect, they should have asked the court to set it aside, and award a *venire de novo*. *Bosseker v. Cramer*, 18 Ind. 44; *Tidd's Prac.* 922; *Smith v. Jeffreys*, 25 Ind. 376; *Elliott's Gen. Prac.*, section 935, and cases cited. The question as to the validity of the special verdict, however, is properly presented under the motion for a new trial and is considered in another part of this opinion. Did the court err in overruling appellant's motion for judgment on the special verdict, and in rendering judgment thereon in favor of appellee?

The special verdict shows that appellant, at the time of the accident, was a boy aged about eight years and seven months, of average size, strength, and intelligence, residing with his parents on Udell street in the city of Indianapolis, three-fourths of one mile from the public resort known as Armstrong Park. The appellee was the owner of, and was operating an electric railroad for the transportation of passengers, in the city of Indianapolis, and in North Indianapolis, in Marion county, Indiana. On June 26, 1892, appellee stopped the train, consisting of a motor car and a trailer, both being open or summer cars with tops supported by posts, at Armstrong Park, for the purpose of receiving passengers. A long step, or foot-board, ran along these cars on the right-hand side (when looking toward the front end), by means of which passengers entered upon the platform or floors of said cars. The cars were provided with seats running across from side to side, upon each of which five persons could be seated. On the left-hand side of the cars there was no step, or other means of entrance, and wooden strips or slats extended from end to end on such left-hand side to prevent the ingress or egress of passengers. These slats were so adjusted that they could be raised or lowered to admit or discharge passengers on that side of the car. No passengers were received by appellee on the left-hand side of its cars at the park on the day mentioned, nor did appellee invite passengers to enter its cars on that side. Appellant, who was at Armstrong Park, got

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upon the forward part of the trailer car, on the left-hand side thereof, placing his feet on the boxing of the axle, and holding on to a portion of a seat with his hands. He neither paid any fare, nor offered to do so, nor was he asked for his fare by any employe of appellee. He had a nickel in his pocket with which he could have paid such fare, and he intended to do so, if asked for it. He rode in the place described, in a stooping position, on the outside of the car, for about three-fourths of a mile, and until he arrived at Udell street, where he intended to get off. Here he was unable to retain his hold and fell off, and was run over by the wheels of the trailer. The right leg, and the toes of the left foot, were so crushed as to require amputation. After the train started, appellant exercised reasonable care, under the circumstances, to avoid being hurt. He could not have gotten off with safety from the time the train started until he fell, nor could he draw himself into the car, or release his hold, for the purpose of stopping it. The cars ran through from Armstrong Park to Udell street without stop. None of the employes of appellee saw the appellant when the train was in the act of starting, or while he was hanging on the outside of the trailer after the train was under way, although they might have seen him if they had made an examination of that side of the car. No such examination was made. The place where appellant was riding was not a proper one, and was very dangerous. The car on which appellant rode was crowded with passengers, many of whom stood on the foot-board or step, and on the floors of the cars. The position of some of these was such as to render it difficult for the employes of the appellee to see appellant. Some of these passengers were near to appellant, while he was hanging on the outside of the car, and, if he had wished to do so, he could have touched them, or spoken to them, thereby making them aware of his presence, or asking them to stop the car. He did neither. When appellant came to the car at the park, there was no room for him to get upon it as a passenger. A bystander told appellant to go

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around to the left-hand side of the car and get on, and he acted on this suggestion. When the car left the park, the seats, the aisles between the seats, the platforms, and the foot or running boards, were full of passengers. Before the day of the accident, appellant had been warned against hanging on the outside of street cars, and riding there. He did not know that he had no right to do so, or that it was a dangerous place to ride. In the usual way of collecting fares upon the car on which appellant was riding, the conductor could have seen appellant, and appellant knew this. Appellant intended to pay his fare when called upon. When the passengers were entering the car at Armstrong Park, the conductor and motorman were temporarily absent from it, and took no part in assisting passengers to get on, or in seating them. When appellant got upon the boxing of the axle at Armstrong Park he did not comprehend the danger of his position, but afterwards became aware of it. While appellant was standing upon the boxing of the axle, and hanging on the side of the car, the train was run at the rate of eighteen or twenty miles per hour. Appellant first attempted to get on appellee's cars as a passenger, from the platform at the east entrance of Armstrong Park, but was unable to do so on account of the crowd of persons on the cars. Appellee's servants in charge of the train could have stopped it after leaving Armstrong Park, and before reaching Udell street, if they had been asked to do so.

Upon a careful review of these facts, giving to the conduct of the appellant the most favorable construction, we do not think that they sustain the proposition that appellant was a passenger upon the appellee's cars, to whom appellee owed the duty of safe carriage and immunity from injury. Appellant was not in a place intended for passengers. He was not received as a passenger. His presence on the car was not made known to appellee's agents and servants. He did not conduct himself as a passenger. Appellee's servants were not required to search for trespassers before starting the cars, and

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appellee was not bound to discover appellant and remove him from the perilous situation in which he had voluntarily placed himself. The distressing consequences of the act of appellant, in standing on the outside of the car on the iron boxing of the axle, cannot be said to be the result of any act or omission of appellee or its employes. The circumstance that appellant had a nickel in his pocket with which to pay his fare—when called upon—did not make him a passenger. If he did not intend to pay his fare unless called upon, and left the car, or attempted to leave it without paying such fare, that fact of itself would be entitled to weight in determining the question of his right on the car. It is shown by the special verdict that, although the train was run at a high rate of speed from Armstrong Park to Udell street, appellant was able to maintain his hold, and did not fall off until he arrived at, or very near, his destination, and that the rate of speed of the cars when approaching Udell street was generally reduced. As the special verdict fails to show that appellant was a passenger, the rules concerning the overloading of street cars, and the duty of street car companies to passengers, stated in *Pray v. Omaha St. R. Co.*, 44 Neb. 167, 48 Am. St. 717, and the cases there cited, do not apply. The fact that appellant was a child, aged eight years and seven months, did not make him any less a trespasser, if the other facts found compel the conclusion that he was wrongfully upon the car. If, after an ineffectual attempt to get on the car at a proper and usual place, he abandoned that intention and became a trespasser, he lost the right to that measure of care and protection which a carrier of passengers is required to extend to one who seeks to be carried as a passenger.

The theory of both paragraphs of the complaint is that appellant was a passenger on appellee's car. The special finding does not sustain this theory. On the contrary, the only conclusion which can be drawn from the facts found is that appellant was wrongfully upon the car, in an improper,

unusual, and dangerous place; that he was not known to be there by appellee's employes in charge of the train; and that the consequent injury was due to his voluntary exposure of himself to evident peril.

We find no error, therefore, in the action of the court in overruling appellant's motion for judgment on the special verdict, and in rendering judgment for appellee.

The constitutionality of the act of March 11, 1895, amending the practice act, and providing for special verdicts, is called in question, and a decision upon it is involved in the refusal of the trial court to give the special instructions tendered by appellant.

Two points are made in support of this objection; *first*, that the subject of the act is not expressed in the title; and *second*, that the act violates the right of trial by jury.

The title is as follows, "An act to amend section 389 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881."

The act so amended is entitled, "An act concerning proceedings in civil cases."

That the title of the act of March 11, 1895, sufficiently complies with the requirement of the Constitution has been frequently decided by the courts of this State. Like decisions have been made by the courts of Louisiana, from the constitution of which state, this provision is said to have been borrowed. *Greencastle, etc., Co. v. State, ex rel.*, 28 Ind. 382; *Walker v. Caldwell*, 4 La. Ann. 297; *Duverge v. Salter*, 5 La. Ann. 94; *Blakemore v. Dolan*, 50 Ind. 194.

It is said in *Greencastle, etc., v. State, ex rel., supra*, that,—"Since the decision in *Walker v. Caldwell, supra*, the legislature of Louisiana, with a few exceptions, has adopted the following formula: "Be it enacted, etc., that section—of an act entitled etc., be amended and reenacted so as to read as follows:"



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A formula substantially like this was adopted by the General Assembly of the State of Indiana, at least as early as March 2, 1853, and the same has been used by every legislature in this State since that date. There is nothing in the first point.

Does the act of March 11, 1895, violate the right of trial by jury? In our opinion, it does not. Except as to their form, the act of March 11, 1895, did not change the law governing special verdicts as it had existed in this State since 1852. The civil code of 1852 required the court, at the request of either party, to direct the jury to give a special verdict in writing upon all, or any, of the issues; and in all cases, when requested by either party to instruct them, if they rendered a general verdict, to find specially upon particular questions of fact to be stated in writing. 2 R. S. 1852, section 336, p. 114.

This provision continued in force until the enactment of March 11, 1895. Its validity was not questioned. Acquiescence in the constitutionality of this statute for so long a period by the courts of this State is a circumstance of some weight in determining the question of the validity of a similar statute.

Independently of this consideration, however, we are unable to perceive that the statute under examination in any way invades the province of the jury, or deprives the citizens of this State of any common law right connected with a trial by jury to which, under the Constitution, they are entitled.

In civil actions, under the Constitution of this State, the jury never possessed the right to decide questions of law. Their inquiries have always been confined to matters of fact. The scope of such inquiries is not abridged by the act of March 11, 1895. The argument of counsel, founded upon the distinction between primary facts and inferences or conclusions from facts, is unsound. If an inference or conclusion from a fact, or facts, is itself a fact proper to be found by the jury, it may be made the subject of an interrogatory.

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But if the proposed inference or conclusion from a fact or facts is not itself a fact, but a conclusion or inference of law, then the jury has no right to find such conclusion or inference. The statute in question authorized either party to submit to the jury every essential question of fact, together with every proper inference or conclusion of fact. If parties to actions did not avail themselves of this privilege, it was not because of any defect or prohibition in the law.

We have examined *Railroad Company v. Stout*, 17 Wall. 657; *Patterson v. Wallace*, 1 Mc. Q., H. L. Cas. 748; *Mangam v. Brooklyn, etc., R. Co.*, 38 N. Y. 455; *Detroit, etc., R. Co. v. VanSteinburg*, 17 Mich. 99; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426; *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142; *Mann v. Belt R. Co.*, 128 Ind. 138; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39, cited by counsel for appellant, and find nothing in them inconsistent with the views expressed in this opinion.

If the jury is required to find any conclusion of law in answer to an interrogatory, such finding must be disregarded. *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 544; *Roller v. Kling*, 150 Ind. 159; *Weaver v. Apple*, 147 Ind. 304.

Appellant complains of the refusal of the trial court to submit to the jury certain interrogatories prepared and tendered on his behalf. The act regulating special verdicts expressly authorized the court to change and modify the interrogatories prepared by counsel. One hundred and forty-four interrogatories were submitted to, and answered by, the jury. They covered every material question of fact in the case. Many of those tendered by appellant's counsel called for mere opinions, for conclusions of law, and for facts which were evidentiary, and the court did right in excluding them.

It is further objected that the court erred in refusing to give special instructions numbered from one to six, tendered by appellant's counsel. It is sufficient to say that where a special verdict is requested no instructions are proper, except

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such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein. *Roller v. Kling*, 150 Ind. 159.

The court gave to the jury all instructions necessary to enable them to understand their duties concerning the special verdict, and the facts to be found therein. It was neither necessary nor proper for it to give general instructions as to the law of the case. *Roller v. Kling*, *supra*, and cases cited.

The motion for a new trial was properly overruled. Finding no error in the record, the judgment is affirmed.

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PRESCOTT ET AL. v. HAUGHEY ET AL.

[No. 18,102. Filed Nov. 29, 1898. Rehearing denied May 9, 1899.]

**NEW TRIAL.**—*Joint Motion.*—Available error cannot be predicated upon the action of the court in overruling a motion for a new trial which is not well taken as to all of the defendants, where the motion is joint and general as to all of the defendants. *pp. 517-523.*

**SAME.**—*Joint Motion.*—*Appeal and Error.*—Where a motion for a new trial made jointly as to all of the defendants is not well taken as to all, the failure of the court, in the exercise of its discretion, to sustain the motion as against part of defendants and overrule it as to others is not reviewable on appeal. *p. 521.*

From the Marion Superior Court. *Affirmed.*

W. V. Rooker, for appellants.

R. O. Hawkins, H. E. Smith, Ferdinand Winter and Baker & Daniels, for appellees.

JORDAN, J.—This action was instituted in October, 1893, and prosecuted in the lower court by appellants, William B. Prescott and Abner G. Wines, to recover a money judgment against the defendants, appellees here, namely: Theodore

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P. Haughey, Chas. F. Meyer, Robert B. F. Peirce, Harvey Satterwhite, and Schuyler Colfax, as the alleged directors of the Indianapolis National Bank, a banking institution organized under the laws of the United States, and situated, and doing business in the city of Indianapolis. This bank failed and closed its doors in July, 1893, and subsequently was placed in the hands of a receiver. Appellants alleged in their complaint that, prior to the time of the failure of the bank, they were depositors of money therein, and purchasers of bills of exchange from said bank, which bills were returned protested and not paid; and the gist of the complaint is that said defendants, as the directors of the bank, were guilty of fraud in making and publishing in certain newspapers from time to time, prior to the failure of the institution, false reports in regard to its solvency, and the security and character of its assets, etc., which reports came to the knowledge of the plaintiffs, who, relying on the same as true, were induced to become depositors in the bank of a large amount of money, and patrons of the institution in the purchase of exchange, as heretofore mentioned. The falsity of these reports, and the deceit practiced thereby, and the damages sustained by the plaintiffs, are averred, and, on the account of the alleged fraud or deceit imputed to the defendants, the plaintiffs sue them, and demand judgment against all.

Appellees separately answered the complaint by a general denial of all of its material allegations and a trial by jury resulted in the latter, by the direction of the court, returning a verdict in favor of all of the appellees. Appellants jointly applied for a new trial, and assigned 129 reasons in support of the motion, among which it is stated that the verdict is contrary to the evidence and is not sustained thereby. This motion the court denied, and appellants excepted, and the error, and the only one assigned in this appeal, is predicated upon the action of the court in overruling the motion.

The application, or motion for a new trial, which appel-

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lants presented to the trial court, was not only joint as to them, but it was so framed as to be in its nature or character a joint and general motion as to all the defendants, and the court thereby was requested to vacate the verdict, and grant a new trial upon the issues as to all the defendants. Or, in other words, appellants so formulated this motion as to place themselves thereunder in the attitude of demanding a re-examination upon all the issues involved in the case, and the grounds assigned therefor were made to apply to the defendants *en masse*, and the theory thereof was that the verdict was incompatible with the evidence as to all, and that the alleged erroneous rulings of the court were prejudicial to both of the moving parties, and favorable alike to all the defendants; and upon this theory, and this alone, appellants in effect insisted that the motion be sustained.

We have so fully referred to and set forth the character or theory of the application presented for a new trial, and the attitude in which appellants placed themselves thereby, for the reason that at the very threshold of the consideration of the questions which they seek to present we are confronted with the earnest contention of counsel for appellees that, inasmuch as the motion is not only joint as to the movers, but also a joint and general one as to all of the five defendants, against whom it is directed, therefore, it must be well taken as against all, else the alleged error, that the court erred in overruling it, can in no respect be available.

It is insisted by appellees that none of the reasons assigned in the motion, under the facts, will entitle appellants to a new trial as to the appellee Colfax, for the reason that there is an entire absence of any evidence offered or given upon the trial, which even tends to establish, as against him, any liability. This contention of counsel we find to be fully supported by the record.

Appellants, on the trial, endeavored to sustain the issues or charge of fraud, imputed by them in their complaint to the appellees, by the introduction of reports made to the comp-

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troller of the currency by the bank mentioned, as required by the statutes of the United States, relating to national banks. These reports, in each particular instance, appear to have been attested, as exacted by the law authorizing them, by the signatures of at least three of the appellees, as the directors of the bank, and were published officially in a newspaper of the city of Indianapolis, and were published in other newspapers of that city, and also by means of "folders." None of the reports in question was signed by the appellee Colfax and there is no evidence tending to show that he had any connection whatever, either in making any of the reports, or in their publication. In fact, we fail to find any evidence in the record which can be accepted as disclosing that Mr. Colfax was a director of the bank, or that he was connected therewith, or that he had anything to do with the management of its affairs.

Appellants seemingly made no effort to introduce any evidence which would entitle them, under their complaint, to recover against him. It was specifically stated by them to the court that the reports of the bank and other documentary evidence were offered as evidence against the appellees other than Colfax. When tested by the record, there are absolutely no facts to support, as against him, any of the grounds assigned in the motion for a new trial, and it is too clear for controversy that the action of the trial court, under the circumstances, in directing a verdict as to him, was proper and right, and there could be no reason for appellant's demanding a retrial of the issues as to him.

It is not a case where there is some evidence or some ruling of the court which can be said to be applicable to the defendant, but the case presented is one in which there is an entire absence of any such evidence and ruling. Appellants, it would seem, in the light of the evidence, improperly and unnecessarily brought the appellee Colfax into this action, and during the trial, when they must have been apprised by the facts that the charge of fraud as against him could not be

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sustained, instead of moving to dismiss the action as to him, they proceeded to prosecute it as against all, until the return of the verdict, and then, apparently not content with the result, they so formulated their motion, and placed themselves in the position thereby of challenging, jointly and generally under the facts, the right of Colfax to the verdict, so far as it concerned him, along with the rights of his codefendants, instead of so framing the motion as to make it applicable alone to the latter.

While the court might, perhaps, have exercised its discretion, if in its judgment the facts justified it, and sustained the motion upon all of the issues in the case, so far as the same related to the defendants other than Colfax, and affirmed the verdict as to him, still its failure to exercise such discretion in the matter is not available as reversible error, nor is it a proper question for review upon appeal to this court. *Dorsey v. McGee*, 30 Neb. 657; Elliott's App. Proc., section 839.

The reason for the rule, as asserted in *Dorsey v. McGee*, *supra*, is that, in order to make the decision of the trial court denying an application for a new trial in any event a case for reversal on appeal, it should appear that it was presented to the court in the terms or on the theory upon which it ought to be sustained. That the trial court may, on a proper application, when authorized by the facts, vacate a verdict as to some of the parties, in whose favor it has been returned, and affirm it as to the others, cannot be controverted. The motion in question, as we have seen, however, was directed against the defendants as a body, and was, under the terms or reasons assigned therein, alike applicable to all, and the burden was upon the appellants, as the moving parties, to show that they were entitled to have it sustained as presented; otherwise there could be no available error imputed to the action of the court in overruling it. *Kendel v. Judah*, 63 Ind. 291.

This rule by analogy finds support in the well affirmed

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principle that a motion for a new trial must be good as to all who unite therein, or it will not be good as to any; or, in other words, where two or more parties join in a motion or application to have a verdict or finding set aside and a new trial granted, it is properly denied, if the verdict or finding of the court can be justified as to any of the moving parties. Elliott's Gen. Prac., section 992, and authorities there cited in foot-note 1. *Sweeney Co. v. Fry*, 151 Ind. 178, and cases cited.

It is also sustained by a similar rule, whereby it is held that where a complaint or other pleading, consisting of several paragraphs or specifications, is challenged as an entirety by a demurrer for insufficiency of facts, the demurrer is properly overruled if one of the paragraphs or specifications, at least, is good, although the others may be bad. *Raymond v. Wathen*, 142 Ind. 367, and cases there cited; and it is also upheld by the same general principle by which it is asserted that, if a series of propositions be embraced in the charge of the court to the jury, and the charge be excepted to in a mass, and one of the propositions be correct, the exception is rightly overruled, regardless of the fact that the others may be bad. *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385; *State v. Gregory*, 132 Ind. 387; *Wertz v. Jones*, 134 Ind. 475.

The rule is in harmony with the one which asserts that where several parties unite in the same assignment of errors in this court, they will meet with defeat unless the assignment can be sustained as to all. Elliott's App. Proc., section 318. In fact, the doctrine that a motion for a new trial ought to be presented to the court, in terms or upon the theory which all who unite therein have the right to insist that it shall be sustained, is but the application of the general principle so often affirmed as shown by the authorities to which we have referred.

It must follow, under the circumstances, as a necessary result of the application of the rule in question, that we can



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do nothing in this appeal but ascertain whether appellants are entitled, under their motion, to insist, as they did, that the verdict should be set aside as to all of the appellees, and finding that they are not entitled to have it vacated as to the appellee, Colfax, for the reasons stated, we must affirm the judgment without further inquiry as to the merits of the questions which appellants seek to present in regard to the other appellees. Judgment affirmed.

McCabe J., doubts.

ON PETITION FOR REHEARING.

**PER CURIAM.**—Counsel for appellants in his brief in support of the petition for rehearing in this cause apparently assails the opinion of the court upon the ground that the holding therein is to the effect that it is merely a matter of discretion with the trial court to grant a new trial, where a motion therefor is properly presented, and embraces therein reason sufficient for sustaining it. No such interpretation can in reason be placed upon the opinion in this appeal. The verdict of the jury, as stated, was a joint one against both plaintiffs, and in favor of all the defendants. The application for a new trial was joint as to the movers, and the grounds assigned therein, while separate as to each other, were applied alike to all of the defendants, and the movers demanded thereby that the trial court treat the application as an entirety, and sustain it, not as to part of the defendants, but as to all of them, regardless of the fact that none of the reasons specified had any application whatever to the defendant Colfax. There are no facts exhibited by the record which even tend to support, as against him, any of the 129 reasons assigned for a new trial. It is evident, therefore, that appellants, under the circumstances, are not in an attitude successfully to complain in this appeal that the lower court erred in denying their motion for a new trial as an entirety.

We held at the former hearing that the trial court might

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in its discretion have treated the motion as joint and separate in respect to the defendants and have sustained it as to those other than Colfax, in the event the facts, under the law, justified such action; nevertheless, the failure of the lower court to exercise this discretion, under the circumstances, was not open to review upon appeal to this court. The same conditions may be said to prevail as where a charge of the lower court is assailed in gross as erroneous in a motion for a new trial, parts of which charge are good, and others bad. The court may, in such cases, in its discretion, examine the different parts separately, and, if any are bad, grant a new trial; but it cannot be required to do so as a matter of right, under the particular circumstances in the case; consequently the failure to exercise such discretion cannot avail the moving party on appeal. This rule is substantially affirmed in the case of *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385, and the many other cases cited in the original opinion.

In the *McCarty* case, *supra*, on page 388 of the opinion, it is said by this court through Mitchell, J.: "The object of a motion for a new trial is to bring to the attention of the court the precise point in respect to which error is supposed to have been committed, with a view that it may be corrected."

It certainly may be further said that when the particular error, or errors, assigned in the motion do not apply alike to all of the parties against whom it is directed, then the motion ought to specify as to which ones of said parties the supposed errors are applicable. In such cases it may then be easily ascertained by the court whether one or more of the grounds assigned are well taken as against some of the adverse parties, and not well taken as to others, and the action of the court upon the motion may be governed accordingly. We are referred to the case of *Louisville, etc., R. Co. v. Treadway*, 143 Ind. 689. That decision, however, lends no support to the contention of counsel for the petitioners. In that case each of the defendants filed a separate motion for judgment in its favor on the special verdict. All that this court

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did in that appeal was to affirm the judgment in part, and reverse it in part, as it was authorized to do under the express provisions of the code, and direct that the separate motion for judgment by the "Clover Leaf" Company be sustained. Had the motion for judgment been a joint one by both of the defendants, a different question would have been presented.

Counsel for appellants also cite *Bartholomew v. Langsdale*, 35 Ind. 278, where it is held, in effect, that an assignment of error in a motion for a new trial to the instructions as a whole is sufficient to require the court to search the entire charge for supposed errors. Had counsel for the petitioners, however, further extended his research, he would have discovered that the case last mentioned on this point is expressly overruled in *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385.

In addition to the authorities heretofore cited, the following, by analogy at least, support the rule asserted in this appeal: *First Nat. Bank, etc., v. Colter*, 61 Ind. 153; *Boyd v. Anderson*, 102 Ind. 217; *Carnahan v. Chenoweth*, 1 Ind. App. 178, and cases there cited.

We have given the reasons presented for a rehearing full consideration, and perceive nothing to warrant the court in granting the petition. It is therefore overruled.

RODWELL V. JOHNSTON ET AL.

[No. 18,770. Filed Feb. 14, 1899. Rehearing denied May 18, 1899.]

EXECUTION.—*Supplementary Proceedings.—Life Insurance.—Assignment of Policy*—Plaintiff sought by proceedings supplementary to execution to subject to the payment of her judgment against defendant, an endowment insurance policy on the life of defendant, which policy by its terms was payable fifteen years after date to the insured, his heirs, executors, administrators, or assigns. Before the commencement of the action the policy was sold and assigned by defendant to his wife. *Held*, that in the absence of fraud in the assignment of the policy the action could not be maintained.

From the Vanderburgh Circuit Court. *Affirmed*.

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*S. R. Hornbrook and W. M. Wheeler*, for appellant.

*W. M. Blakey and J. E. Williamson*, for appellees.

MONKS, C. J.—This was a proceeding supplementary to execution instituted by appellant against appellees. Appellant sought to subject to the payment of his judgment against appellee William A. Johnston, an endowment insurance policy on the life of said Johnston for \$5,000, executed by the appellee, the New York Life Insurance Company, to said Johnston, payable in fifteen years after date to him, his heirs, executors, administrators, or assigns, and held by appellee Macke as security for the loan of money made by him to said appellee Johnston. It is alleged in the complaint that the appellee Susan Z. Johnston, wife of the appellee William A. Johnston, claims to have an interest in said insurance policy, and that appellant believes that said claim is wrongful and invalid. Appellant by her complaint admits the validity of the lien of appellee Macke on said policy, to secure the indebtedness of said Johnston to him, and only asks that what remains of said policy after the payment of said lien be applied in payment of her judgment.

A cross-complaint was filed by appellee Macke by which he sought to enforce his lien against said policy. The court tried said cause, and found against appellant, and, over a motion for a new trial, rendered judgment against her. The only error properly assigned calls in question the action of the court in overruling appellant's motion for a new trial. The causes assigned for a new trial are: (1) That the decision of the court is not sustained by sufficient evidence; (2) that the decision of the court is contrary to law.

The policy provided that if the premiums are not paid on or before the day when due, the policy should become void, and all premiums previously paid should be forfeited to the company, and no action, or right of action, shall be maintained against the company by the assured, or any other person, and all right, claim, or interest, arising under any statute,

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or otherwise, to or in any paid-up policy or surrender value, or to any temporary insurance, whether required or provided for under any statute, or not, is hereby expressly waived and relinquished.

There was evidence to the effect that a premium was due on said policy of \$377.55 July 1, 1896, and the insured was unable to pay the same, and that Macke who held the policy as security refused to pay the same, and that appellee, William A. Johnston agreed with appellee Susan Z. Johnston in consideration that she would pay the premium, that if he could not sell the same within sixty days for enough to pay off the claim of appellee Macke, and the amount paid by her, the policy should be hers and he would transfer the same to her, subject to the lien of appellee Macke, in which event she was to pay on the indebtedness of said William A. Johnston the further sum of \$363 out of said policy when collected; that on September 3, 1896, not having been able to sell said policy for the amount provided in said agreement, William A. Johnston assigned and transferred the same to her in writing, in all respects as required by the rules of the said company.

This evidence shows that the insurance policy was sold and assigned to appellee Susan Z. Johnston before the commencement of this action, and also before the rendition of the judgment which is the foundation of this proceeding. If the policy was owned by her when this action was commenced the finding against appellee was clearly right under the issues. It is not alleged in the complaint that any sale or assignment of said insurance policy was made to the appellee Susan Z. Johnston, nor are any facts alleged showing that such assignment was fraudulent and void for any reason as to appellant. *Harris v. Howe*, 2 Ind. App. 419. If such facts had been alleged, however, we could not have disturbed the finding upon the weight of the evidence.

It is contended by appellees that the contract of insurance was such that, even if it were the property of appellee Wil-

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liam A. Johnston, it could not be reached in any way for the payment of appellant's judgment. It is not necessary, however, to determine this question, for the reason that if it could be so applied it had been sold and assigned to another before this action was commenced. Judgment affirmed.

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## WILLIAMS ET AL. v. RICHARDS.

[No. 18,889. Filed May 9, 1899.]

**APPEAL.—Estoppel.—Acceptance of Benefits.**—A party may not accept a benefit based on the legality of an adjudication, and thereafter maintain an appeal therefrom. p. 530.

**SAME.—Appointment of Receiver for Partnership.—Acceptance of Benefits Accrued Under Decree of Court.—Waiver of Right of Appeal.**—A partnership was to continue at the pleasure of the partners. The plaintiff, one of the partners, who by the terms of the articles of partnership had charge and management of the business, notified the defendants, the remaining members of the firm, that a continuance of the partnership was not agreeable to him, and later brought suit to declare the partnership dissolved. An interlocutory order was entered appointing a receiver who by order of court was directed to continue the business as a going concern. The final decree of the court declared the firm dissolved, and directed sale and distribution of the property. After rendition of such decree the several partners accepted from the receiver certain shares of assets giving receipts containing the recital "on account of distribution as per order of court." Defendants appealed from the decree as an entirety. *Held*, that the defendants, by the acceptance of their respective shares of assets, waived their right to appeal, since the money received accrued under the decree, and not under the partnership contract. pp. 528-530.

From the Marion Superior Court. *Dismissed.*

*F. Winter*, for appellants.

*C. W. Smith, J. S. Duncan, H. H. Hornbrook, A. P. Smith, B. K. Elliott* and *W. F. Elliott*, for appellee.

BAKER, J.—Richards, Williams, and Smith were partners in conducting a newspaper business under the name of The Indianapolis News Company. The contract contained provisions that "the partnership shall exist so long as its continu-

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ance is agreeable to the several partners" and that "Richards shall have charge and management of the business department". Richards notified the others that the continuance of the partnership was not agreeable to him, and later brought this suit to declare the firm dissolved and to wind up the business. On application of Richards an interlocutory decree was entered appointing a receiver "to take forthwith into his possession all and singular the assets of every nature and description belonging to said firm, as well also the business of said partnership, and the same to hold, conduct and manage under such orders as this court may from time to time make in this cause". The receiver was directed further to continue the business as a going concern; to familiarize himself at once with the property, circulation, etc., so that he might impart just and correct information to "persons desirous of or contemplating bidding at any sale which may be hereafter ordered"; and to distribute amongst the parties from time to time such accumulation of profits as the parties might agree could properly be divided, and in case of their failure to agree, to report to the court, whereupon distribution would be made or withheld as the court should order. The final decree declared the firm dissolved, directed sale and final distribution in proportions determined by the court, and ordered that until sale and confirmation the receiver should continue the business in all respects as required by the interlocutory decree.

Appellee meets the assignment of errors with a verified answer in bar and motion to dismiss the appeal. From this it appears, and it is admitted by appellants, that since the rendition of the final decree the receiver has distributed amongst the parties in the proportions fixed in the decree over \$16,000, and over \$8,000 have been distributed since this record was filed; and that each party gave the receiver a receipt containing the recital "on account of distribution as per order of court".

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A party may not accept a benefit based on the legality of an adjudication and thereafter be heard to complain that it is erroneous. *Manlove v. State*, (Ind.) 53 N. E. 385; *Sonntag v. Klee*, 148 Ind. 536; *McGrew v. Grayston*, 144 Ind. 165, and cases cited; *Rouge v. Lafargue Bros. Co.*, 49 La. Ann. 998, 22 South. 190; *Carll v. Oakley*, 97 N. Y. 633; *Williams v. Williams*, 6 N. Dak. 269, 69 N. W. 47; *Cronkhite v. Evans, etc., Co.*, 6 Kan. App. 173, 51 Pac. 295; *Cook v. McComb*, 98 Wis. 526, 74 N. W. 353.

This appeal is from the decree as an entirety. Appellants may not act upon part and resist the residue. But they contend that they have not accepted any benefit that has its basis in the legality of the decree, that what they have accepted they received as their due under the partnership contract. By the contract each party had the right to end the partnership at will. After appellee notified appellants that the partnership was no longer agreeable to him, appellants were not entitled to a continuance of appellee's services in managing the business for their benefit. By the contract appellee had the charge and management of the business department of the newspaper. Appellants had no right to run the business, nor to have it continued for them. After appellee's notice, appellants' rights under the contract were to receive their proportionate share of a distribution upon an immediate winding up of the firm's affairs. To resist dissolution was a violation of their contract. The firm's assets were taken into the custody of the court. By virtue of the court's decree the business has been carried on, and appellants, while prosecuting this appeal, have been receiving moneys under the decree divided in proportions fixed by the decree. These benefits accrued to appellants, not by the contract, but by the court's action upon their breach of the contract. Appeal dismissed.



Pennsylvania Co. v. Ebaugh.

THE PENNSYLVANIA COMPANY v. EBAUGH.

[No. 18,883. Filed May 10, 1899.]

APPEAL AND ERROR.—*Record.*—*Instructions.*—Instructions made part of the record by order of court and fully set out in the order are properly in the record on appeal. *p. 533.*

NEW TRIAL.—*Instructions.*—*Assignment of Error.*—An assignment in a motion for a new trial for "error of the court in refusing to give to the jury each of the instructions, severally asked, numbered one, two, three," and for "error of the court in giving to the jury each of the instructions given by the court numbered one, two, three," is sufficient to challenge each instruction of each set of instructions. *p. 533.*

MASTER AND SERVANT.—*Knowledge of Danger.*—*Assumption of Risk.*—An employe assumes not only the ordinary dangers of his employment which are known to him, but also such as by the exercise of ordinary diligence would have been known to him. *pp. 533-535.*

From the Marion Circuit Court. *Reversed.*

*Samuel O. Pickens*, for appellant.

*William V. Rooker*, for appellee.

HADLEY, J.—Appellee brought this action against appellant to recover damages for the loss of an arm which resulted from injuries received while attempting to couple cars while in the service of appellant as a brakeman on one of its freight trains. The complaint is in three paragraphs. A demurrer to each was overruled. Answer in general denial. Verdict and judgment for appellee. Error is assigned upon the overruling of the demurrers to the complaint; in overruling appellant's motion for judgment upon answers to interrogatories, notwithstanding the general verdict; and in overruling appellant's motion for a new trial.

The negligence charged in the first paragraph relates to the order of the conductor to the plaintiff to couple two cars of different construction,—the draw-bars of one being higher than the draw-bars of the other, and the deadwoods so negligently constructed and maintained that the cars were but eight inches apart when the deadwoods collided,—which

152	531
154	536
154	537
154	538
155	181
152	531
158	300
152	531
160	327
152	531
162	101
152	531
164	151
152	531
166	672

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conditions were known to the defendant, and unknown to the plaintiff, and on account of which conditions the plaintiff, in attempting to couple said two cars, was caught between them, held fast, and injured. The second, in addition, alleged that the north rail of the track where the plaintiff was ordered to make the coupling had a strong, sharp splinter of iron protruding therefrom, and that, when the plaintiff stepped in to make the coupling, said splinter penetrated his shoe and held him fast, whereby he was injured. The third charges that the night was very dark, and the plaintiff, acting under the rules and regulations of the company, and orders of the conductor, took his station at the standing car, and signaled for the backing and slowing up of the train, but, instead of coming back slowly, the conductor negligently cut two cars from the rear of the backing train, that, unrestrained, rushed violently and unexpectedly upon and injured him.

Appellant requested the court to charge the jury that if they found the plaintiff was injured solely by the negligence of the conductor of the train, and that the defendant was free from fault in employing said conductor, or in retaining him in its service, such injury was the result of the negligence of a co-employee, and that they should find for the defendant. Appellant's counsel says in his brief: "The overruling of the demurrer to each paragraph of the complaint, and the refusal to give said instruction to the jury, present the question of the validity of the Employers' Liability Act." No objection is made to either paragraph of the complaint, nor to the refusal of the court to give said instruction number twenty, further than that the act of 1893 (Acts 1893, p. 294, section 7083 Burns 1894), upon which it is claimed they rest, is obnoxious to the Constitution. Since the brief was written, this court has decided the question here propounded adversely to the position assumed by the appellant. *Pittsburgh, etc., R. Co. v. Montgomery, ante, 1; Pittsburgh, etc., R. Co. v. Hosea, ante, 412.*

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The correctness of certain instructions given and refused is challenged by appellant's motion for a new trial. Appellee submits that the instructions given and refused are not properly in the record, because no filing of the same is disclosed. Both sets are made part of the record by order of court, and both are fully set out in the order. This brings them properly into the record. *Close v. Pittsburgh, etc., R. Co.*, 150 Ind. 560.

Appellee also contends that neither the instructions given nor those refused are in the record so as to question them severally. The alleged error is stated in the motion for a new trial as follows: For "error of the court in refusing to give to the jury each of the instructions severally asked, numbered one, two, three," etc. For "error of the court in giving to the jury each of the instructions given by the court numbered one, two, three," etc. "Each" is a word of distribution,—implies severalty,—and the assignment is sufficient to challenge each instruction of each set. *Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613.

Instruction nineteen given by the court is as follows: "(19) If you find from a fair preponderance of the evidence that plaintiff, without any fault or negligence on his part, while exercising due care, sustained the injury complained of, by reason of the roadbed at the point where he was working being out of repair, as charged in the complaint, and that such condition was unknown to the plaintiff, and that such condition was known to the defendant, or had so long continued or was of such a nature that it would have been known to the defendant by the exercise of ordinary diligence on the part of the defendant, so as to have avoided said injury, then your verdict should be for the plaintiff." The defendant requested, and the court refused to give, the following: "(5) The court instructs you further, as a matter of law, that an employe of a railroad company cannot recover from the company for an injury suffered in the course of the business in which he is employed, from defect-

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Pennsylvania Co. v. Ebaugh.

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ive machinery used therein, or from the dangerous condition of the track, after he has knowledge of such defective or dangerous condition, or by the exercise of ordinary care might have had knowledge of such defective or dangerous condition." The objection urged against instruction nineteen is that it limited the plaintiff's assumption of risk to the defects in the roadbed of which he had actual knowledge. It is a rule of universal acceptance by the courts of this country that an employe assumes all the ordinary dangers of his employment, which are known to him, or which by the exercise of ordinary diligence would have been known to him. It is alike the duty of the employer and employe to be diligent in the discharge of their reciprocal duties, for the avoidance of personal injury to the latter; and both are alike bound to know, and will be chargeable as knowing, all facts and conditions that a person of ordinary caution and prudence, in a like situation, would have discovered. Neither may close his eyes nor carelessly neglect observation and inquiry for the safety of the employe, and find immunity on the ground that he did not have actual knowledge of the danger. In such cases constructive knowledge has the same force and effect as actual knowledge. *Reitman v. Stoltz*, 120 Ind. 314; *Indiana, etc., R. Co. v. Daily*, 110 Ind. 75; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517; *Barnard v. Schrafft*, 168 Mass. 211, 46 N. E. 621; *Stubbs v. Atlanta, etc., Mills*, 92 Ga. 495, 17 S. E. 746. It is a familiar rule that a party is entitled to have the jury instructed in the law as applicable to all material questions of fact involved in the case and to have the law applicable thereto clearly, correctly, and fully stated; and if a court proceeds on his own motion, and employs his own language in the performance of this duty, he must state the law correctly and fully upon all questions of fact in evidence to which he directs the jury's attention; and, if he has overlooked any material question of fact to which evidence has been adduced, either party so

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desiring may tender and request the giving of an instruction covering the omitted fact; and if the instruction so requested is pertinent, and correctly states the law, and is tendered at the proper time, it is the duty of the court to submit it to the jury. Whether appellee had had such reasonable opportunity to know the defective condition of appellant's roadbed at the place of injury, as that a person of ordinary diligence and regard for his own safety would have taken notice of, was a material fact not covered by instruction nineteen given by the court, and is covered, and the law correctly stated, in number five requested by appellant, and refused. *Consolidated Stone Co. v. Summit, ante, 297*. In this case it is said: "To sustain such allegations, however, the evidence must show that the employe not only had no knowledge of the defect, but could not have known the same by the exercise of ordinary care."

For error of the court in giving to the jury instruction nineteen and refusing number five, requested by appellant, the judgment must be reversed. As the question upon the overruling of appellant's motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, is not likely to arise upon a retrial of the cause, we deem it unnecessary to review it.

Judgment reversed, and cause remanded, with instructions to grant a new trial.

THE ALEXANDRIA GAS COMPANY v. IRISH,  
ADMINISTRATOR, ET AL.

[No. 18,641. Filed May 11, 1899.]

RECEIVERS.—Appointment.—Notice.—Fraudulent Conveyances.—The court has no jurisdiction to appoint a receiver in an action to set aside a conveyance as fraudulent, and for the appointment of a receiver, without notice, and before summons is issued on such complaint.

From the Madison Circuit Court. *Reversed*.

153	585
157	398
152	520
161	400
162	604
152	535
171	244

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Alexandria Gas Co. v. Irish.

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*M. A. Chipman, E. E. Hendee, and S. M. Keltner*, for appellant.

*Bagot, Ellison & Bagot*, for appellees.

MONKS, C. J.—This is an appeal from an interlocutory order appointing a receiver. It appears from the record that appellee on May 17, 1898, filed a complaint in the office of the clerk of the court below to set aside certain transfers of property made by the Alexandria Mining & Exploring Company to appellant, upon the ground that said transfers were fraudulent, and made by said Alexandria Mining & Exploring Company to appellant, with the fraudulent intent and purpose to cheat, hinder, and delay appellees in the collection of certain judgments theretofore recovered by them against the Alexandria Mining & Exploring Company. Said complaint, which was verified, also set forth causes for the appointment of a receiver without notice. The appointment of a receiver was ancillary to the main action. The Alexandria Mining & Exploring Company was in the hands of a receiver, but neither said company nor the receiver was made a party to said complaint. On the same day that the complaint was filed, the court below, upon the verified complaint, and without any notice whatever to appellant, appointed a receiver to take possession of appellant's property. No summons was issued by the clerk of the court below, nor did appellees request the clerk to issue any summons on said complaint, until the 21st day of May, 1898, when a summons was, for the first time, issued against appellant. At the first opportunity, on May 19, 1898, appellant objected to said appointment of said receiver, which objection was overruled by the court.

The question presented is whether the court had jurisdiction to appoint a receiver without notice, before a summons had been issued on said complaint against appellant. It is settled law in this State that in an action like this the court

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has jurisdiction to appoint a receiver only after the commencement of an action, and while it is pending. *State v. Union Nat. Bank, etc.*, 145 Ind. 537, 545, 549; *Presley v. Harrison*, 102 Ind. 14; 20 Am. & Eng. Enc. of Law, 17, 24, 30, 87. The process must be delivered to the officer authorized to serve it before the action is deemed commenced. Section 316 Burns 1894, section 314 Horner 1897; *Coffey v. Myers*, 84 Ind. 105, 106, and cases cited; *School Township v. Hay*, 74 Ind. 127; *Fordice v. Hardesty*, 36 Ind. 23; *Temple v. Irvin*, 34 Ind. 412.

The interlocutory order appointing a receiver having been made before the action was commenced, the court had no jurisdiction. Said interlocutory order therefore must be, and is, reversed.

HATFIELD ET AL v. CUMMINGS, RECEIVER.

[No. 18,579. Filed May 12, 1899.]

152	537
155	677
156	565

**APPEAL AND ERROR.—Law of Case.**—A decision of the Supreme Court that a complaint is sufficient is conclusive upon all questions relating to such pleading in a subsequent appeal. *pp. 538, 539.*

**JUDGMENT.—Motion in Arrest.—Sufficiency.**—A motion in arrest of judgment on the ground that the complaint had been changed in a material part without leave of the court after the cause had been reversed by the Supreme Court is properly overruled, where it does not appear when or by whom the alteration was made, or at what time it was discovered. *p. 539.*

**RECEIVERS.—Appointment.—Collateral Attack.—Building and Loan Associations.**—A stockholder in a building and loan association cannot attack the proceedings and order of the court appointing a receiver of such association in a proceeding by the receiver to foreclose a mortgage against him. *p. 540.*

**APPEAL AND ERROR.—Conclusions of Law.—Joint Exception.**—An exception taken by all of the defendants, jointly, to all of the conclusions of law, is not available on appeal unless it is well taken as to all of the defendants, nor unless all of the conclusions are erroneous. *p. 541.*

**SAME.—Evidence.—Special Finding.**—A special finding is entitled to the same consideration as a general finding or a verdict, and cannot be set aside on appeal if there is any evidence sustaining it. *p. 542.*

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From the Wabash Circuit Court. *Affirmed.*

*J. T. Alexander, Kenner & Lesh and J. M. Hatfield, for appellant.*

*Whitelock & Cook and Slick & Hunter, for appellee.*

DOWLING, J.—This is the second time this case has come before this court on appeal. 140 Ind. 547. The suit was brought by the appellee, as receiver, to enforce the collection of a note executed by James M. Hatfield, one of the appellants, and to foreclose two mortgages, given by Hatfield and his wife, to secure the payment of the said note and another debt. On the former appeal, the judgment of the trial court was reversed for error in sustaining a demurrer to the third paragraph of the answer of James M. Hatfield. Afterwards, in the Wabash Circuit Court, to which the case had been sent on a change of venue, the issues were made up, and upon the trial of the cause and a special finding therein, judgment was rendered in favor of appellee. Errors are assigned as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court erred in overruling appellant's motion in arrest of judgment.
3. The court erred in sustaining appellee's motion to strike out part of appellant's motion in arrest of judgment.
4. The court erred in overruling the demurrer of James M. and Thursy J. Hatfield to the second paragraph of the reply, to the joint answer of the Hatfields, and the Huntington City Building and Loan Association.
5. The court erred in its conclusions of law.
6. The court erred in overruling appellant's motion for a new trial.

Upon the first error assigned, we are asked to reëxamine the complaint. On the former appeal, this court held the complaint sufficient, and that ruling is conclusive upon all questions relating to that pleading. *Hatfield v. Cum-*



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Hatfield v. Cummings, Rec.

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*mings, Rec.*, 140 Ind. 547. The rule is thus stated in Elliott's App. Proc., section 578: "It is a firmly settled principle that the decisions of the appellate tribunal constitute the law of the case upon all the points in judgment, no matter at what stage of the proceedings they arise, or in what mode they are presented. This rule is not one springing from the doctrine of *stare decisis*, but it is one founded upon the same principle on which rests the doctrine of *res adjudicata*. Questions before the court for decision, and by the court decided as essential to a final judgment, are conclusively and finally adjudicated. The law as declared can not be changed upon a second or subsequent appeal." See, also, *Board, etc., v. Bonebrake*, 146 Ind. 311; *James v. Lake Erie, etc., R. Co.*, 148 Ind. 615; *Jeffersonville, etc., Co. v. Riter*, 146 Ind. 521.

The motion in arrest of judgment was not made until after the motion for a new trial, but it is next in order in the assignment of errors. The sole ground of the motion was the statement of the appellant, James M. Hatfield, verified by his affidavit, that the complaint had been changed in a material part, without the leave of the court, after the judgment in this cause was reversed by the Supreme Court. It was not shown when such change was made, by whom it was made, or at what time the alteration was discovered. For all that appears, appellants knew that the amendment was made, if there was such an amendment, before they went to trial. The motion was destitute of merit, and was properly overruled. For the same reasons, the court was fully justified in striking out the affidavit of Hatfield, filed in support of the motion.

Appellants also contend that the second paragraph of the reply to the joint answer of the Hatfields and the Huntington City Building, Loan and Savings Association was not sufficient to avoid said answer, and that the demurrer thereto should have been overruled. This paragraph of the reply sets out in detail the bringing of the suit by one Harvey C.

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Black for the appointment of a receiver of the Lime City Building, Loan and Savings Association, and the subsequent proceedings therein, including the appointment of a receiver, and the entering of a judgment authorizing said receiver to bring suits, to collect all moneys due to said association, and to perform various other duties. It also avers that at the time of these proceedings James M. Hatfield and Thursy J. Hatfield were stockholders and members of the said Association, and that James M. Hatfield was a party to the said suit, and set up the same matters therein by way of defense to the same, as are set up by him and his codefendants in the present action. The reply contains many other allegations concerning the suit in which the receiver was appointed, but those mentioned here are sufficient to indicate its character and scope. In our opinion, the second paragraph of the reply was good. The Hatfields, as members and stockholders of the Lime City Building, Loan and Savings Association, were bound by the judgment of the court appointing a receiver for that corporation. *Hatfield v. Cummings, ante*, 280.

The demurrer to the second paragraph of the reply to the joint answer of the Hatfields and the Huntington City Building, Loan and Savings Association was properly overruled.

Appellants next question the correctness of the conclusions of law upon the special finding of facts. These conclusions are as follows:

“*First.* That the defendants, Hatfields, being members and stockholders in the said Lime City Building, Loan and Savings Association at the time the order appointing the plaintiff receiver of said association was entered, and at the time of rendering final judgment so commenced and prosecuted by said Harvey C. Black, are bound thereby, as if they had each been, and continued until its final determination to be parties defendant in that suit.”

“*Second.* That as to the defendant, the Huntington City Building, Loan and Savings Association, it can attack the

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order and judgment of the Huntington Circuit Court appointing the plaintiff receiver by a direct proceeding for that purpose only, and cannot question them or have them reviewed in this action; and that said defendant has no interest in the land involved herein other than that arising under its purchase upon the foreclosing decree as set out in the fifth finding of facts herein, and that its interest is subsequent and junior to the lien of the plaintiff."

"*Third.* That the plaintiff, Luther Cummings, receiver of the Lime City Building, Loan and Savings Association, is entitled to a judgment against said defendant, James M. Hatfield, upon the notes and mortgages in this action, in the sum of \$2,519.11, principal and interest, and \$550 attorney's fees, making in all \$3,069.11, without relief from valuation or appraisal laws."

"*Fourth.* That said plaintiff is entitled to a decree foreclosing the mortgages in this cause, and an order for the sale of the real estate described in the said mortgages, and in the finding as aforesaid, to satisfy said judgment as against all the defendants in this action."

The exception to the foregoing conclusions of law was taken and entered in these words: "To which conclusions of law all of the defendants except."

The exception having been taken by all the defendants, jointly, to all the conclusions in gross, it cannot avail the appellants unless it is well taken as to all of them, nor unless all of the conclusions are erroneous. *Saunders, Treas., v. Montgomery*, 143 Ind. 185; *Clause, etc., Co. v. Chicago, etc., Bank*, 145 Ind. 682; *Earhart v. Farmers Creamery*, 148 Ind. 79; *Royse v. Bourne*, 149 Ind. 187, 190; *Cincinnati, etc., R. Co. v. Cregor*, 150 Ind. 625; *Elliott's App. Proc.*, section 401.

It is impossible to determine from the confused and obscure statements of appellants' brief which of the conclusions are objected to, or for what reason they are supposed to be erroneous. It is asserted that "in the findings of fact

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there is no authority found from the court to the receiver to sue in his own name;" that "it is not shown that the legal title to the corporate assets has been assigned to the appellee." Again, it is said that, "A second defect in the findings of fact is that neither the receiver nor the court had determined upon the validity of any claim against the association, or the receiver before this suit was commenced." Then the validity of the judgment in the case of *Black v. The Lime City Building, Loan and Savings Assn.*, is discussed, and other matters equally irrelevant are brought into the argument.

It is evident that none of these objections is sufficient to overthrow the conclusions of law. It is clear, also, that they do not apply to all of the conclusions. It cannot be maintained that the *second* conclusion is erroneous as to the Hatfields, and prejudicial to them, or that the *third* is erroneous as to the Huntington City Building, Loan and Savings Association.

The last error assigned and discussed is the decision of the court overruling the motion for a new trial.

The reasons for this motion, insisted upon in appellants' briefs, are that the special findings are not sustained by sufficient evidence; that the decision of the court is contrary to law; and that the court failed to find certain facts which appellants think should have been found.

A special finding is entitled to the same consideration as a general finding or a verdict. It cannot be set aside if there is any evidence sustaining it. *Robinson v. Hathaway*, 150 Ind. 679.

We have read the evidence with the utmost care, and are satisfied that it sustains the findings of the court in every particular, and that there is no ground for the claim of the appellants that the facts stated in their motion for a new trial should also have been found. Moreover, we are convinced that the merits of the case were fairly tried and determined in the court below, and that a just conclusion was reached. The judgment is affirmed.

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Boyd v. Brazil Block Coal Co.

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152	543
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## BOYD v. BRAZIL BLOCK COAL COMPANY.

[No. 18,556. Filed March 11, 1898.]

SUPREME COURT.—*Jurisdiction.—Cause Will Not be Transferred from Appellate to Supreme Court at Instance of an Amicus Curiae.*—The question of the constitutionality of a statute is not “duly presented” within the meaning of section 1336 Burns 1894, so as to give jurisdiction to the Supreme Court and require a cause to be transferred from the Appellate Court, where the question of constitutionality is not raised except in a brief on appeal filed by an *amicus curiae*.

From the Clay Circuit Court. *Transferred to the Appellate Court.*

*S. D. Coffey* and *Albert Payne*, for appellant.

*Geo. A. Knight*, for appellee.

HOWARD, C. J.—This is an action for damages for the death of appellant's intestate. The damages claimed are \$3,000, and the jurisdiction is in the Appellate Court, unless the constitutionality of a statute “is in question and such question is duly presented.” Section 1336 Burns 1894, Acts 1893 p. 29. No question as to the constitutionality of the statute referred to (section 7473 Burns 1894) is presented by any pleading, either in the trial court or on the appeal. Neither is it raised in the briefs of counsel, either for the appellant or for the appellee. Mr. Lucius C. Embree, as *amicus curiae*, has, however, filed a brief in the cause, giving as a reason for his appearance that a question involved in this appeal had been raised in a case in the Gibson Circuit Court, and in the brief so filed he argues that the statute cited is unconstitutional. We do not think a question “is duly presented” when so raised in the brief of an *amicus curiae*. In the trial court the *amicus curiae* could not have excepted to the ruling of the court. *Campbell v. Swasey*, 12 Ind. 70; *Hust v. Conn*, 12 Ind. 257; *Knight v. Low*, 15 Ind. 374. In this court he could not file a petition for a

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rehearing. *Parker v. State*, 133 Ind. 178. Still less could he, by the mere filing of a brief, raise an issue not raised by the parties themselves. An *amicus curiae* is heard only by leave, and for the assistance of the court in matters presented by the parties to the action. He has no control of a case, whether on trial or on appeal, and has no right to institute any proceedings therein, or to cause the case to be brought from one court to another. 2 Enc. Pl. & Prac., 758, 759. See, also, *City of Charleston v. Cadle*, 167 Ill. 647, 49 N. E. 192, and *Nauer v. Thomas*, 13 Allen, 572. The constitutionality of the statute in question not being duly presented, the jurisdiction of this appeal is in the Appellate Court; nor can the question be hereafter raised in the case, so as to give jurisdiction to this court. *Lewis v. Albertson*, *post*, 693. Transferred to Appellate Court.

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BANE v. KEEFER ET AL.

[No. 18,392. Filed May 16, 1899.]

182	544
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1171	274

**APPEAL AND ERROR.**—*Directing Verdict.*—*New Trial.*—An alleged error of the court in directing a verdict must be presented by motion for a new trial and error assigned in this court on such ruling. pp. 547, 548.

**SAME.**—*Directing Verdict.*—*Review.*—*Evidence Not in Record.*—The Supreme Court will not review the action of the trial court in directing a verdict where the evidence is not in the record. p. 548.

**SPECIAL VERDICT.**—*Failure to Sustain Material Averments of Complaint.*—Plaintiff was employed to assist in blasting and removing stone and other debris from a sewer, and was injured by an explosion caused by striking his pick against an unexploded charge of dynamite. The negligence charged in the complaint was that defendant in blasting drilled numerous holes in the stone, loaded them with dynamite, and discharged them at the same time, instead of discharging one at a time, causing portions of the dynamite to remain in the holes unexploded, and rendering the place dangerous. The special verdict found that plaintiff knew that dynamite was used in such blasting, and on a number of occasions dug out unexploded loads of dynamite along the line of the sewer; that the work of removing stone from the sewer after blasts had been made was dangerous and hazardous, and such danger was apparent to a man

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of ordinary intelligence; that the method employed by defendant for discharging the dynamite was the best known for such purposes, and was recognized as a proper and safe method. *Held*, that the facts found by the special verdict did not entitle plaintiff to a judgment under his complaint. *pp. 545-551.*

From the Wabash Circuit Court. *Affirmed.*

*J. C. Branyan, J. S. Branyan, L. M. Ninde, W. M. Ninde, Wm. A. Branyan, B. F. Ibach and Alvah Taylor*, for appellant.

*Walter Olds, C. F. Criffin, J. F. France, Z. T. Dungan, J. B. Kenner and U. S. Lesh*, for appellees.

JORDAN, J.—Action by appellant in the Huntington Circuit Court against appellees, Henry Keefer and the city of Huntington, to recover damages for personal injuries sustained by reason of an explosion of dynamite in the construction of a sewer in said city. The venue was changed to the Wabash Circuit Court, wherein a trial resulted in the court, upon the evidence, directing the jury to return a verdict in favor of the city of Huntington, and in giving judgment in favor of the defendant Keefer on the special verdict returned by the jury in answer to interrogatories submitted under the statute of 1895.

The second additional paragraph of the complaint, which is the only pleading in the nature of a complaint embraced in the record, may be said to be repetitious and diffusive in its averments in respect to the charge of negligence. It discloses, however, among other things, that the defendant, Keefer and one Hallwood were partners, doing business as contractors under the firm name of Keefer & Hallwood. Prior to December 4, 1894, this firm entered into a contract with the city of Huntington for the construction of a sewer. It is averred that in excavating for the sewer it was necessary to remove, along the line thereof, "ledges of hard and flinty stone varying in depth from one to ten feet." To remove this rock it was necessary to use powerful explosives, in the

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**Bane v. Keefer.**

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use of which great care was required; and the substance used for such purpose was required to be handled by persons who were experts in the use thereof, so as to protect the workmen engaged in the construction of the sewer. In the blasting of these ledges it is averred that numerous holes were drilled in the stone, and loaded with dynamite, which was discharged by means of electricity. It is then averred "that the only safe way to discharge these holes was by discharging but one at a time, or at least not more than two, so that, after the electrical shock, it was easily and readily seen if the same were all discharged, as the defendants well knew; but said contractors, or defendants aforesaid, being inexperienced themselves, and having no experts to attend to and use the dynamite, loaded numerous holes at a time, and connected these holes so loaded by means of an electrical appliance, and in this manner attempted to discharge these numerous holes at one and the same time by means of an electrical battery; that said means of discharging the holes were imperfect, and defective, and unreliable, in this: that it was not sure and certain to discharge each and every one of the numerous loaded holes, and, owing to the defect in not discharging all of them, there remained, after the application of the electricity, in some holes undischarged and live dynamite,—all of which was known to the defendants, but was not known to the plaintiff." It is alleged that "the plaintiff was not an expert in the use of dynamite, and had no knowledge that said work of blasting was done in such a negligent manner and with such imperfect and defective appliances; nor was he informed that more than one or two holes were attempted to be discharged at one time; neither did he know that said contractors were inexperienced men in such work, nor that they had employed no expert," etc. Prior to December 4, 1894, it is averred that plaintiff was employed by the defendant Keefer to work for him in the construction of this sewer to pick and shovel loose stones and dirt, and on said day he was directed by the defendant to loosen stone and dirt in the



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sewer at a place where said defendant had attempted to discharge a number of holes at one blast by means of said defective appliances; that all of said holes had not been discharged, and live dynamite was left concealed in some of the holes, which, however, was unknown to plaintiff, that on December 4, 1894, while engaged in said work in such unsafe and dangerous place, without having been warned of such hidden danger, which could have been known by defendants, and while in the discharge of his duty, using due care and caution, and without any fault on his part, while so working he struck with his pick an undischarged load of dynamite in the bottom of the sewer, placed there for the purpose aforesaid, and which defendant had attempted to discharge in the careless manner aforesaid. In striking said dynamite with his pick it exploded with great force, and seriously injured plaintiff, etc.

The theory upon which the complaint proceeds, as outlined by its material facts, is to the effect that the negligence upon which the plaintiff bases his cause of action is attributable to the fact that more than two of the holes which had been drilled in the stone for the purpose of blasting were loaded and attempted to be discharged at the same time by the means of a defective electric appliance or battery; that, by reason of this unexploded dynamite being left concealed in some of these holes, the place at which plaintiff was at work at the time of the accident was rendered unsafe, which fact was unknown to him; and that said danger was incurred by him when at work in the line of his duty, and that he was injured thereby as alleged.

Considering the state of the record as it appears in this appeal, and the assignment of errors thereon, the only question presented for our decision is, do the legitimate facts embraced in the special verdict entitle appellant to a judgment under his complaint?

As heretofore stated, the trial court upon the evidence, instructed the jury to return a general verdict in favor of the

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defendant, the city of Huntington. With this instruction the jury complied. No motion for a new trial is set out in the record; neither is the evidence before us; and the only attempt to present for review the action of the court in directing a verdict upon the evidence in favor of the appellee the city of Huntington is by an assignment of error that the court erred in instructing the jury to find a general verdict in favor of the city of Huntington. It is evident, therefore, under these circumstances, that no question upon the merits of the case, in respect to the city of Huntington, is presented for our consideration, and the judgment of the court in its favor must be affirmed. If the trial court was of the opinion that the evidence was not sufficient to be submitted to the jury for it to determine the question involved under the issues joined between the plaintiff and the city of Huntington, then, under the rules as asserted and enforced by the decisions of this court, it had a right to direct a verdict in favor of the city, and its action in so doing ought to have been assigned in a proper motion as a reason for a new trial. If this motion had been overruled, then, on appeal to this court, error ought to have been assigned on such ruling, and, in the event the evidence was in the record, the ruling of the court in regard to the city of Huntington would have been before us for review. We have stated the theory of the complaint as outlined by its material facts. This theory, under a well settled rule, must be substantially supported by the material facts embraced in the special verdict, and must be sustained by the law governing the case, before appellant can be entitled to a judgment in his favor on such verdict. *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Elliott's App. Proc.*, sections 753, 754; *Cummings v. Citizens', etc., Association*, 142 Ind. 600. Therefore, assuming the sufficiency of the complaint, as no question to the contrary is raised, we may proceed to determine the question properly presented relative to the liability of the appellee Keefer under the facts set out in the special verdict. The jury in this verdict,

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*Bane v. Keefer.*

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among other things, find that Keefer & Hallwood, as partners, prior to December 4, 1894, contracted with the city of Huntington to construct a sewer therein. In constructing such sewer it was necessary to excavate large ledges of hard rock, and thereby it became necessary to use heavy explosives, such as dynamite, in breaking up said rock, and the defendant Keefer knew that the rock would have to be removed by the use of dynamite. Plaintiff, as it appears, had been in the employment of Keefer & Hallwood from the 1st day of August, 1894, until December 4, 1894, the day of the accident, as a common laborer, assisting in the construction of the sewer. During this period his work consisted in part in helping to blast in the excavation of the sewer, and he knew that dynamite was used in such blasting. He also worked at removing loose stones which had been broken by means of the blast, and assisted in doing various work about the sewer, but he had nothing to do with the electric battery or appliance by means of which the blasts were discharged. On a number of occasions prior to the accident he dug out unexploded loads of dynamite along the line of the sewer. The work of removing stone from the sewer, after blasts had been made, was, as the jury find, "dangerous and hazardous," and the manner in which the work of excavating was done after the blasts had exploded made it apparent to a man of ordinary intelligence that the same was a dangerous and hazardous employment. The verdict further states that the blasting was done by drilling holes in the rock, and then loading them with dynamite and placing a cap on the load with wires extending above the surface, these wires being attached to a lead wire which was itself connected with an electric battery or appliance by the means of which the dynamite in the holes was exploded. This method, as employed by the defendants for discharging the dynamite, the jury find was the best known for such purposes, and was recognized as a proper and safe method. On December 4, 1894, the plaintiff was at work in the sewer, removing loose stone with a pick, and

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struck his pick against a piece of live dynamite, which was concealed in or among the stones. This dynamite, by the stroke of the pick, was exploded, and great injury was thereby sustained by the plaintiff. The verdict states that there is "no proof" to show that any person knew that there was any dynamite at the point where the plaintiff was at work immediately before he was injured. It is also stated therein that immediately after an explosion or blast of dynamite took place the persons in charge of the blasting in the sewer would examine to see if all of the loads had been discharged, and the defendant's employes, as it appears, on the day of the accident, and before the same occurred, made a search for unexploded dynamite, but found none, and they believed, it is stated, that there was no dynamite at the point where appellant was at work at the time he sustained his injuries. Other facts are stated, but we do not deem it necessary to set these out specifically. As heretofore said, it is apparent from the averments of the complaint that the pleader intended to base an actionable charge of negligence on the alleged facts that the said defendant was negligent in loading with dynamite more than two holes in the rock which was being excavated, and then attempting to discharge the blasts by the defective battery, thereby causing dynamite to remain concealed unexploded in the stone, rendering by this means the place in which the plaintiff was at work unsafe or dangerous. It was by reason of these facts, it is averred, that the plaintiff failed to discover that some of the loads had not been discharged. This theory finds no support under the facts disclosed by the special verdict. In fact, there is an affirmative finding that the manner or method by which the dynamite was exploded was a proper and safe one, and was recognized to be a proper and safe method. We fail to discover any facts stated in the special verdict that can be said in any manner substantially to support the particular negligence which the complaint imputes to the defendant Keefer. Certainly,

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under such circumstances, appellant is not shown to be entitled to a judgment in his favor on the verdict, even though it be conceded that it does reveal negligent acts in other respects upon the part of the defendant. The burden was upon the plaintiff to sustain the material and issuable facts upon which he founded his charge of negligence. Consequently the special verdict must embrace such material facts as can be said substantially, at least, to respond to or support those which by his complaint constitute his cause of action; otherwise he must fail in his demand for a judgment in his favor on such verdict. This rule is well affirmed, as shown by the authorities heretofore cited, and by others to which we might refer.

It is insisted by counsel for appellees that the facts set out in the verdict show that appellant worked for over four months prior to the accident in the construction of the sewer in question; that he assisted in blasting therein, and that the work of removing the loose stones after the blast was dangerous; that such danger was apparent to a reasonable and intelligent person; that he knew that all of the dynamite at times did not explode, as it is shown he assisted in removing unexploded loads thereof from the stone previous to the accident, etc.; that he made no complaint, but continued in the service of appellees, and thereby, it is contended, he is shown to have assumed all of the risk incident to the service in which he was engaged, and therefore cannot recover. As the judgment must be affirmed for the reasons heretofore stated, we are not required to consider this feature of the case. In support of the rule, under the facts, for which counsel for appellees contend, see *Wabash R. Co. v. Ray, Adm.*, ante, 392, and cases there cited; *Kenney v. Shaw*, 133 Mass. 501; *Rogers v. Leyden*, 127 Ind. 50; *Griffin v. Ohio, etc., R. Co.*, 124 Ind. 326; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

The judgment of the court in favor of the appellee Keefer

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on the special verdict is a correct result, and is therefore affirmed, as is likewise the judgment in favor of the city of Huntington.

## ZIMMERMAN v. GAUMER ET AL.

[No. 18,477. Filed May 17, 1899.]

**APPEAL AND ERROR.—Parties.**—Cross-complainants are not necessary parties appellant in a vacation appeal by plaintiff from a judgment against her that she take nothing by her action, and for costs, where the cross-complainants were not parties to such judgment *p. 554.*

**SAME.—New Trial.**—Causes for new trial cannot be reviewed on appeal unless presented in motion for new trial and the ruling on the motion assigned as error. *pp. 554, 555.*

**SAME.—Record.**—The action of the court in sustaining a demurrer to a complaint cannot be reviewed on appeal where the complaint is not in the record. *p. 555.*

**SAME.—Record.—Amended Complaint.—Waiver.**—Exception to ruling of court in sustaining demurrer to complaint is waived by filing amended complaint. *p. 555.*

**SAME.—Record.**—An assignment that the court erred in overruling a demurrer to an answer is not available where the demurrer is not copied in the record. *p. 555.*

**VENIRE DE NOVO.—Failure to Find All the Facts.—New Trial.**—The remedy for failure of the jury to find all the facts is by motion for new trial, and not by motion for *venire de novo*. *p. 556.*

**APPEAL AND ERROR.—Venire De Novo.—Exception.**—Error in overruling a motion for a *venire de novo* is not available on appeal, where no exception was reserved to such ruling. *p. 556.*

**JUDGMENTS.—Payment by One Primarily Liable.—Assignment by Judgment Plaintiff.**—The payment of a judgment by one primarily liable for the payment thereof amounts to an absolute satisfaction of the same, although the judgment is assigned by the judgment plaintiff to the person paying it. *pp. 556, 563.*

**SAME.—Payment by Judgment Defendant.—Assignment.—Principal and Surety.**—When a judgment is paid by one of the judgment defendants and the judgment assigned to him he is not entitled to an execution thereon until it has been judicially determined, either that he was surety on the contract upon which the judgment was rendered, or that he stood in that relation to the judgment when he paid same, or that as between himself and the other judgment defendants, he paid more than his share of the judgment. *pp. 563, 564.*

From the Cass Circuit Court. *Reversed.*

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Zimmerman v. Gaumer.

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*Frank Swigart*, for appellant.

*John B. Smith, D. D. Dykeman and George C. Taber*, for appellees.

MONKS, C. J.—This action was brought by appellant against appellees to set aside a sheriff's sale of real estate on a decree of foreclosure, and the sheriff's deed made thereunder, and to quiet title to the undivided one-fifth of said real estate. The amended complaint, the one upon which the trial was had, was in two paragraphs. The first paragraph set forth the facts concerning the sheriff's sale, and asked that the same be set aside. The second paragraph was in the form provided by statute in actions to quiet title, and asked that the title to said real estate be quieted. Appellees Charles H. and Mary Gaumer filed an answer to said complaint, and also a cross-complaint, in which they alleged that they each owned the undivided one-fifth of said real estate, and sought to set aside said sheriff's sale, and for other proper relief. Appellees Robert G. Pasley and Eliza Pasley his wife filed answers.

The issues joined on the first paragraph of complaint and the cross-complaint were tried by the court, and the second paragraph of the complaint was tried by a jury at the same time. The court, for its information, submitted to the jury the questions of fact arising upon the part of the case tried by the court. At the April term, 1896, of the court below, the jury returned a special verdict under the provisions of section 555 Burns Supp., 1897, Acts 1895, p. 248, as to the issues joined upon the second paragraph of complaint, and also upon the questions of fact submitted to it for the information of the court. A motion for *venire de novo* was filed by appellant at said April term, and overruled by the court. At the September term of said court, the court found for appellee Robert G. Pasley upon the issues joined upon the first paragraph of complaint and the cross-complaint, and over a motion by appellant for a judgment in her favor on the special verdict sustained the motion of said Pasley for a judgment in

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his favor, and rendered a judgment in favor of said Pasley on the issues joined on the first and second paragraphs of the complaint against appellant, and for costs, and in favor of said Pasley against appellees Mary E. Gaumer and Charles E. Gaumer on the issues joined on the cross-complaint, and for costs. Afterwards appellees Charles E. and Mary E. Gaumer and Milton H. Gaumer filed separate motions for a new trial, which were overruled.

Appellee Robert G. Pasley has filed a motion to dismiss the appeal, on the ground that this is a vacation appeal, and all the co-parties to the judgment below have not been made parties appellant in this court.

As heretofore stated, there was a judgment rendered in favor of Pasley against appellant that she take nothing by her complaint, and that he recover of her his costs. The cross-complainants were not parties to the judgment against appellant. There was also a judgment that the cross-complainants take nothing, and that appellee Pasley recover of them his costs. Appellant was not a party to this judgment against the cross-complainants. The cross-complainants were not, therefore, joint judgment defendants with appellant, and she was not required, in a vacation appeal, to make them co-appellants, (*Lowe v. Turpie*, 147 Ind. 652, 692, 37 L. R. A. 245), although it may have been proper for her to do so. The motion to dismiss the appeal is therefore overruled.

Appellees Charles E. Gaumer, Mary E. Gaumer and Milton H. Gaumer assign cross-errors against their co-appellees.

Eighteen errors are assigned by appellant, the fifth, sixth, seventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth of which assigns as errors that the court erred in sustaining motions to suppress parts of depositions; in sustaining the motion to submit the issues joined upon the first paragraph of the amended complaint to the court without the intervention of a jury, thereby denying appellant a trial by jury as to said paragraph; in sustaining the motion



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of Robert G. Pasley to require the jury to return a special verdict under the act of 1895; and in admitting and excluding evidence. These are all causes for a new trial, and must be assigned in the motion as causes therefor, and, if such motion for a new trial is overruled, are presented in this court by an assignment of error that the court erred in overruling the motion for a new trial. *Ohio, etc., R. Co. v. Judy*, 120 Ind. 397, 398, and cases cited; *Huffmond v. Bence*, 128 Ind. 131, 137; *Childers v. First Nat. Bank, etc.*, 147 Ind. 430, 436; *LaFollette v. Higgins*, 109 Ind. 241, 243; *American Digest*, Vol. 3, section 3024, Column 856. The assignments of error therefore present no question for review in this court.

The court sustained the separate demurrers of Robert G. Pasley and Eliza J. Pasley to the complaint, and these rulings are assigned as the first and second errors. They are not available, however, for the reason that the complaint to which said demurrers were addressed was not copied into the transcript; and for the further reason that, even if the complaint had been copied into the transcript, the error, if any, in sustaining said demurrer, was waived by appellant when she filed an amended complaint which took from the record the complaint, the pleading to which the demurrers were addressed. *State v. Jackson*, 142 Ind. 259, and cases cited; *Gowen v. Gilson*, 142 Ind. 328, and cases cited; *Hedrick v. Whitehorn*, 145 Ind. 642, 644, and authorities cited; *Aydellott v. Collings*, 144 Ind. 602, 603, and cases cited.

Overruling a motion to strike out a part or parts of a pleading is not available error; therefore the third error assigned presents no question. *Pfau v. State*, 148 Ind. 539, 542, 543; *Petree v. Brotherton*, 133 Ind. 692, 695.

The fourth error assigned is that "the court erred in overruling appellant's demurrer to the second paragraph of Robert G. Pasley's answer." This demurrer, however, has not been copied into the record, but instead is the following, "Not on file." In such case, even if the pleading is bad for

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any cause, the presumption is that the ground of objection stated in the demurrer did not reach the defect, if any, in the pleading, and was properly overruled for that reason, or that the same was so defectively stated as to present no question. *Dunn v. Dunn*, 149 Ind. 424, 425; *Head v. Doehleman*, 148 Ind. 145, 146; *Aydelott v. Collings*, 144 Ind. 602, 604; *State v. Fitch*, 113 Ind. 478, 480; *Shackman v. Little*, 87 Ind. 181, 182; *Long v. Town of Brookston*, 79 Ind. 183; *Jessup v. Trout*, 77 Ind. 194, 195; *Hammon v. Sexton*, 69 Ind. 37, 41, 42; *Crowell v. City of Peru*, 41 Ind. 308, 309; *Comer v. Himes*, 49 Ind. 482, 487, 488; Elliott's App. Proc. sections 710, 720. This does not seem to be the rule under some circumstances, when the demurrer is sustained. *State v. Fitch*, *supra*.

Overruling appellants motion for a *venire de novo* is the eleventh error assigned. The motion for a *venire de novo* was in writing, and specified as a ground therefor, "that the jury have not found all the facts in the cause." It is settled in this State that a failure of a jury or a court to find all the facts is not a ground for a *venire de novo*. If the facts, within the issue established by the evidence, are not all found, or, if found, are contrary to the evidence, or not sustained by it, the remedy is a motion for a new trial, and not a motion for a *venire de novo*. *Jones v. Casler*, 139 Ind. 382, 388, and cases cited; *Hoosier Stone Co v. McCain*, 133 Ind. 231, 234; *Branson v. Studabaker*, 133 Ind. 147, 161, 163, and authorities cited. Moreover, there was no exception by appellant to the action of the court in overruling said motion. Said ruling, therefore, even if erroneous, is not available. Elliott's App. Proc. sections 293, 624, 783, 788.

The eighth and ninth assignments of error call in question the action of the court in rendering judgment on the special verdict in favor of appellee Robert G. Pasley. The special verdict finds, in substance: That, in 1887, Moses S. Gaumer was the owner of a life estate in eighty acres of real

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estate in Cass county, Indiana, and that his children, Eliza J. Pasley, Charles, Ella, Jeremiah F., and Milton H. Gaumer, were the owners of said real estate in fee simple, as tenants in common, subject to said life estate; that said Moses S. Gaumer borrowed \$250 in 1887, to erect a barn on said real estate, and said Moses S. Gaumer, Robert G. Pasley, Eliza J. Pasley his wife, Jeremiah F. Gaumer, Sarah A. Gaumer, his wife (now the appellant Zimmerman), Charles E. Gaumer, and Milton H. Gaumer executed a note for said money, and a mortgage on said eighty acres of real estate to secure the same. Ella Gaumer, the owner of the undivided one-fifth of said real estate, did not join in said note or mortgage. Said barn was a necessary and permanent improvement to said land, and the owners of said real estate who joined in said mortgage received the consideration therefor. The mortgage recited that the note was given by Moses S. Gaumer for the benefit of all the mortgagors. Afterwards, on July 9, 1890, Moses S. Gaumer as principal, and Milton H. Gaumer as surety, executed three notes to the J. I. Case Threshing Machine Company for \$1,983.50, and as an additional security therefor said Moses S. Gaumer and his wife (he having married) executed a mortgage on said eighty acres of land, which covered his life estate therein. Said notes not having been paid, the J. I. Case Threshing Machine Company recovered a judgment thereon for \$866.80 and costs, February 4, 1892, against Moses S. and Milton H. Gaumer, and a decree of foreclosure against Moses S. Gaumer and his then wife. The life estate of said Moses S. Gaumer was sold on said decree by the sheriff, on March 19, 1892, to the J. I. Case Threshing Machine Company, the judgment plaintiff in said action, for \$300, and said life estate, not being redeemed, was, after the expiration of the year for redemption, conveyed to said purchaser, who took possession thereof under said deed. After the execution of said first mortgage to secure said \$250 note, said Jeremiah F. Gaumer died, leaving

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the appellant as his widow, who inherited the undivided one-third of his undivided one-fifth of said real estate, and she afterwards purchased of the administrator of the estate of her deceased husband the remaining undivided two-thirds of said undivided one-fifth, and received a deed therefor under an order of the court having jurisdiction of said estate, and she thereby became the owner of the undivided one-fifth of said real estate formerly owned by Jeremiah F. Gaumer, her husband. After said sheriff's sale on March 21, 1892, George W. Funk, the then owner of the note and mortgage first mentioned and first executed on said land, commenced an action thereon in the Cass Circuit Court against Moses S. Gaumer and Hannah, his wife, Eliza J. Pasley and Robert G. Pasley, her husband, Charles E. Gaumer and his wife, Milton H. Gaumer and his wife, Levi Snyder, administrator of the estate of Jeremiah Gaumer, deceased, Sarah A. Gaumer (now the appellant Zimmerman), Charles, Clara, Henry, and Mary Gaumer, children of Jeremiah Gaumer, deceased, and the J. I. Case Threshing Machine Company, and others. Afterwards, on May 18, 1893, in said action, said Funk recovered a judgment on said note for \$340.90 against Moses S. Gaumer, Charles E. Gaumer, Milton H. Gaumer, Eliza J. Pasley, Robert G. Pasley, and Sarah A. Gaumer (now Zimmerman), and a decree of foreclosure against all of said defendants, and, on a cross-complaint filed in said action by the J. I. Case Threshing Machine Company, it was adjudged that said company was the owner of the life estate of said Moses S. Gaumer in said land; and that, if said land was sold on the Funk decree, that the sheriff should first apply the proceeds of the sale to the payment of costs, next to the payment of the Funk judgment, and the remainder, if any, on the debt due the J. I. Case Threshing Machine Company, amounting to \$1,078 and interest, not to exceed \$1,700, the value of the said life estate. On August 17, 1893, appellee Robert G. Pasley, the husband of Eliza J. Pasley, and one of the joint

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judgment defendants in the judgment and decree of foreclosure rendered in favor of George W. Funk on May 18, 1893, above set out, paid off said judgment and decree of foreclosure in favor of said Funk, and took an assignment thereof to himself, which was written on the margin of the records of the judgment and decree of foreclosure, and was signed by said Funk and duly attested by the clerk of the Cass Circuit Court. Afterwards, on November 5, 1894, the J. I. Case Threshing Machine Company sold and conveyed to said appellee Robert G. Pasley the life estate of Moses S. Gaumer in said land, and on the 28th day of the same month said Threshing Machine Company sold and assigned to said Pasley the decree rendered on its cross-complaint in the Funk foreclosure case aforesaid. Afterwards, in December, 1894, said eighty acres of real estate was sold to appellee Robert G. Pasley for \$1,794.28, by the sheriff, on certified copies of said decrees in favor of Funk and in favor of the J. I. Case Threshing Machine Company, which were issued to the sheriff of said county "to the use of Robert G. Pasley, the assignee." The proceeds of the sale, after payment of the costs, were paid to said appellee Robert G. Pasley. On November 28, 1894, appellant and Charles E. Gaumer and Mary E. Gaumer attempted to have a settlement with appellee Robert G. Pasley of the amount due from them on account of his having paid the Funk judgment, and said appellee refused to inform them of the amount, and on said day they tendered him \$345.75, as their share of the Funk judgment, which said appellee refused to receive, and they afterwards tendered the same amount to the clerk of the Cass Circuit Court in which said judgment was rendered, who refused the same. The jury also find that appellee Pasley was surety only on the note upon which said Funk judgment was rendered; that all the other makers of the note were principals. The special verdict shows, as do the decrees upon which said land was sold, that no sale could be made of said land except on the judgment and decree in favor of Funk.

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The balance of the judgment and decree against Moses F. and Milton H. Gaumer, rendered February 4, 1892, remaining unpaid after the sale of said life estate on said decree, was not a lien on the life estate therein. The threshing machine company received a deed for the life estate at the end of the year, and before the decree in favor of Funk and the decree of the threshing machine company on its cross-complaint were rendered. At the time said decrees were rendered in the spring of 1893, the threshing machine company owned and held said life estate under said deed, and it was so adjudged in said decree. If then the Funk judgment and decree were satisfied, or if the land could not be sold thereon for any reason, the same could not be sold on the decree rendered on the cross-complaint of the threshing machine company. The right of the appellant and the other owners of the fee simple of said land, subject to said life estate, as against appellee Robert G. Pasley, the purchaser at said sale, are governed by the relation of the parties to the Funk judgment and decree, and not by the decree of the threshing machine company on its cross-complaint. It is the legal rule in this State that payment of a judgment by one primarily liable is an absolute satisfaction of the same, even if the judgment is assigned to the person paying it by the judgment plaintiff. *Montgomery v. Vickery*, 110 Ind. 211, 212, 213, and cases cited; *Shields v. Moore*, 84 Ind. 440; *Klippel v. Shields*, 90 Ind. 81, 82; *Myer v. Cochran*, 29 Ind. 256; *Laval v. Rowley*, 17 Ind. 36. See also *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' Bank*, 74 N. Y. 228; *Mathews v. Lawrence*, 1 Denio (N. Y.) 212; *Hammatt v. Wyman*, 9 Mass. 138; *Preslar v. Stallworth*, 37 Ala. 402; *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236; *Bartlett v. McRae*, 4 Ala. 688; *Towe v. Felton*, 7 Jones (N. C.) 216; *Hinton v. Odenheimer*, 57 N. C. 406. In *Klippel v. Shields*, *supra*, this court at p. 82 said:—"Payment by one primarily liable as a judgment debtor extinguishes the judgment. *Harbeck v. Vanderbilt*,

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20 N. Y. 395; *Booth v. Farmers Bank*, 74 N. Y. 228; *Ham-matt v. Wyman*, 9 Mass. 138; *Preslar v. Stallworth*, 37 Ala. 402; *Towe v. Felton*, 7 Jones (N. C.) 216; *Hinton v. Odenheimer*, 57 N. C. 406. There are cases where a different rule applies, as where the person who pays the debt occupies the relation of surety, or some similar relation, but the present case does not belong to that class. *Spray v. Rodman*, 43 Ind. 225. The fact that the deed was made to the wife of Lycurgus Shields does not affect the operation of the rule. The payment was by him, and this had the effect to completely extinguish the judgment, and no further valid proceedings could be had upon it. *Myers v. Cochran*, 29 Ind. 256; *Shields v. Moore*, 84 Ind. 440. The controlling fact in such a case as this is the payment by one legally bound to pay, and the fact that an assignment is made to him or to some one else is not of controlling importance. If one whose duty it is to pay the debt makes the payment, then an assignment will not keep the debt alive. Sheldon on Subr., section 50." It is provided by section 1226 Burns 1894, section 1212 Horner 1897, that "When any action is brought against two or more defendants upon a contract, any one or more, of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff." Section 1227 Burns 1894, section 1213 Horner 1897, provides that, "If the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution, first, upon and exhaust the property of the principal, before a levy shall be made upon the property of the surety; and the clerk shall indorse a memorandum of the order on the execution." Section 1228 Burns 1894, section 1214 Horner 1897, provides, that, "When any defend-

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ant surety in a judgment, or special bail or replevin bail, or surety in a delivery bond or replevin bond, or any person being surety in any undertaking whatever, has been or shall be compelled to pay any judgment, or part thereof; or shall make any payment which is applied upon such judgment by reason of such suretyship; \* \* \* the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment; and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use." Section 1229 Burns 1894, section 1215 Horner 1897, provides, that "Any one of several judgment defendants, and any one of several replevin bail, having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the codefendants or cosureties, to collect of them the ratable proportion each is equitably bound to pay." It is the right of a surety, or indorser, or one standing in a like relation, to a principal debtor, independent of any statute, if compelled to pay the debt, to be subrogated to the rights of the creditor, and if the creditor has a judgment, to use the judgment for the purpose of coercing payment by the principal. *Downey v. Washburn*, 79 Ind. 242, 246; *Manford v. Firth*, 68 Ind. 83; *Thomas v. Stewart*, 117 Ind. 50, 53, 1 L. R. A. 715, and cases cited. Where a surety pays a judgment against himself and principal, in which suretyship is not shown, an assignment of the judgment by the judgment creditor to him does not authorize execution to be issued thereon. *Shields v. Moore*, 84 Ind. 440, 445; *Klippel v. Shields*, 90 Ind. 81, 82; *Knopf v. Morel*, 111 Ind. 570, 573; *Thomas v. Stewart*, 117 Ind. 50; *Harter v. Songer*, 138 Ind. 161, 168, 169. Under sections 1226, 1228 Burns 1894, sections 1212, 1214 Horner 1897, if the person or persons who are sureties pay off a judgment before the question of suretyship is judicially determined, such question may be tried and determined by the court in which the original



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judgment was rendered, in a proper proceeding after such payment. But such action to try the question of suretyship, if brought after the payment of the judgment, is barred by the six years statute of limitations, which begins to run from the date of such payment, if the same is pleaded. *Frank v. Traylor*, 130 Ind. 145, 147, 149, 11 L. R. A. 115, and cases cited; *Smith v. Harbin*, 124 Ind. 434, 438, 439; *Kreider v. Isenbice*, 123 Ind. 10, 15; *Knopf v. Morel*, 11 Ind. 570, 573, 574; *Stout v. Duncan*, 87 Ind. 383, 389, 390; *Shields v. Moore*, 84 Ind. 440, 445; *Scherer v. Shutz*, 83 Ind. 543; *Laval v. Rowley*, 17 Ind. 36, 39, 40. To obtain an execution on such judgment so paid by him, the surety must bring an action against the other judgment defendants, to try the question of suretyship, and secure an order for an execution thereon. *Kreider v. Isenbice*, *supra*; *Montgomery v. Vickery*, 110 Ind. 211, 213; *Shields v. Moore*, 84 Ind. 440, 445; *Laval v. Rowley*, *supra*; *Scherer v. Schutz*, *supra*; *Stout v. Duncan*, *supra*; *Frank v. Traylor*, *supra*; *Harter v. Songer*, 138 Ind. 161.

It is clear, we think, that in this State when a judgment is paid by one of the judgment defendants, and the question of suretyship has not been judicially determined, that, even if he has taken an assignment of the judgment to himself, he is not entitled to an execution thereon until he has, in a proper action, had it determined either that he is surety on the contract upon which such judgment was rendered, or that he stood in that relation to the judgment when he paid the judgment, or that, as between himself and the other judgment defendants, he has paid more than his share of the judgment, in which case he is entitled to an execution on the original judgment against such other judgment defendants for the amount he has paid more than his share. *Harter v. Songer*, *supra*, and cases cited. It is much the better rule in such case that the question of the rights of the judgment defendants in a judgment, as between themselves, be judicially de-

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terminated before an execution can issue, than that it be determined after the sale of real or personal property on an execution or copy of a decree issued upon such a judgment. If the right to such execution and the relation of the judgment defendants to each other are fixed by the judgment of a court having jurisdiction before execution can issue, then persons bidding at such sale will know what they are buying; otherwise, they do not know, and cannot know, whether by such sale they will get any title to the property sold.

While the jury found that the appellee Robert G. Pasley was surety only on the note and mortgage upon which the Funk judgment and decree were recovered, and the other persons against whom said judgment and decree were rendered were principals, yet said relation was not shown by that judgment, nor had any proceeding been brought to determine that question before the sale of said real estate to said appellee in December, 1894, on the Funk decree of foreclosure. Said judgment was joint against said Pasley and the other judgment defendants. Therefore, when appellee Robert G. Pasley took the assignment of the Funk judgment and decree to himself, he could not, under sections 1226, 1228 Burns 1894, sections 1212, 1214 Horner 1897, take an execution or a copy of the decree thereon, until there had been a trial and final adjudication that he was the surety of the other judgment defendants in said judgment, and an order that execution issue thereon. *Kreider v. Isenbice*, 123 Ind. 10; *Knopf v. Morel*, 111 Ind. 570; *Shields v. Moore*, 84 Ind. 440; *Harter v. Songer*, 138 Ind. 161. It is evident, from what we have said concerning the law applicable to the facts found by the special verdict, that the court erred in rendering judgment thereon in favor of appellee Robert G. Pasley.

The action of the court in overruling the motions for a new trial is also called in question. An examination of the evidence leads to the conclusion that the same misconception of the law as applied to the facts which caused the court to

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render judgment on the special verdict in favor of appellee Pasley against appellant on the second paragraph of complaint also caused the court to find for the appellee Robert G. Pasley on the first paragraph of the complaint, and on the cross-complaint. It is clear, therefore, that the finding of the court on the issues submitted to it was contrary to law, and a new trial thereof should be ordered. Under such circumstances, we think that, instead of directing a judgment on the special verdict in favor of appellant on the second paragraph of complaint, and a new trial as to the part of the cause tried by the court, a new trial of the whole case should be ordered.

The judgments are therefore reversed, with instructions to grant a new trial of the whole case, with leave to file amended pleadings if desired, and for further proceedings not inconsistent with this opinion.

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THE STATE v. BRACKEN.

[No. 18,799. Filed May 17, 1899.]

**FORGERY.**—*Affidavit and Information.*—An affidavit and information charging that defendant “altered, forged, and counterfeited a certain written receipt” is bad for repugnancy.

From the Lake Circuit Court. *Affirmed.*

*O. J. Bruce, M. M. Bruce, T. H. Heard, W. L. Taylor,*  
Attorney-General, and *Merrill Moores*, for State.

*J. Frank Meeker*, for appellee.

**HADLEY, J.**—Appellee was charged by affidavit and information in the Lake Circuit Court with forgery. Appellee’s motion to quash the affidavit and information was sustained, and the State appealed.

The alleged forgery consists in the alteration of a paper miscalled a “receipt.” The paper is as follows:

“Mrs. C. Lincoln in account with J. A. Donaha, Dealer in bituminous and anthracite coal, wood, etc.:

Delivery only includes nearest point to which a team can

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be driven. Extra charge for basketing up stairs or down cellar.

Dec. 7, 1,780 soft.....	3.56
Dec. 11, 12,150 nut.....	39.47
	<u>43.00</u>
May 8, check.....	10.00
	<u>33.00</u>
June 22, cash.....	5.00
	<u>28.00</u>
June 22, 1,050 soft.....	2.10
	<u>30.10</u>
June 22, cash.....	2.00
	<u>28.10</u>
Sept. 13, cash.....	12.00
	<u>16.10</u>
Oct. 7, cash.....	16.10"

The prosecution is under section 2354 Burns 1894. The alterations charged consist of placing the figure one to the left of the figure two in the September 13th cash payment, and in entering on the statement the balancing credit of \$16.10 on Oct. 7th. The paper is not signed by any one. It does not purport to be a receipt or acquittance for money or other property. It does not appear who made the genuine statement, or why it was made, or how Bracken came to be connected with it, or how he intended to cheat or defraud Donaha. With respect to said paper it is charged in the affidavit and information that William Bracken "did on the 30th day of September, 1897, at the county of Lake and State of Indiana, unlawfully, feloniously, and falsely make and cause to be made, defaced, *altered*, forged, and *counterfeited*, a certain written receipt for money and property, release and discharge of a certain debt, account, and demand, which false, defaced, *altered*, forged, and *counterfeit* instrument is as follows," with intent to cheat and defraud the said John A. Donaha. The charge is that the receipt was false,

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forged, altered, and counterfeited. An altered receipt necessarily implies the existence of a genuine receipt, while a counterfeited receipt necessarily implies one that is wholly false. The charge is repugnant, and the affidavit and information therefore bad. *Bittings v. State*, 56 Ind. 101, 104; *Kirby v. State*, 1 Ohio St. 185.

There are probably other reasons why the affidavit and information are insufficient to charge the crime of forgery, which we deem unnecessary to consider. Judgment affirmed.

AIKMAN ET AL. *v.* STATE, EX REL. WADSWORTH.

[No. 18,768. Filed May 18, 1899.]

**OFFICERS.—County Treasurer.—Term of Office.**—The term of office of a county treasurer elected at the general election of 1896, whose term had not commenced when the act of 1897 (Acts 1897, p. 288) took effect, commences on the 1st day of January next following the expiration of the term of the treasurer in office when the act took effect. *pp. 568, 569.*

**SAME.—County Treasurer.—Term of Office.**—Where a county treasurer whose term of office expired August 5, 1897, had served the constitutional limit of four years, the office became vacant until the 1st day of January, 1898, by reason of the act of 1897 (Acts 1897, p. 288) fixing the time of commencement of the term of office of county treasurers, which vacancy the board of county commissioners had the right to fill by appointment. *p. 569.*

From the Daviess Circuit Court. *Reversed.*

*M. S. Hastings, J. G. Allen, E. E. Hastings, J. C. Billheimer, P. R. Wadsworth and W. Q. Williams*, for appellants.

*W. R. Gardiner, C. G. Gardiner and Padgett & Padgett*, for appellee.

**MONKS, C. J.**—This was a proceeding by information to determine which of three claimants was entitled to the office of treasurer of Daviess county.

Appellant, Henry Aiken, was elected treasurer of Daviess county at the general election of 1892, for a term to commence August 5, 1893. He qualified and took possession of

1898	567
1898	164
152	567
d171	628

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his office, and at the general election of 1894 was elected his own successor. On August 5, 1895, he entered upon the discharge of the duties of his second term. At the general election of 1896 the relator, John Wadsworth, was elected treasurer of said county. Before the 5th day of August, 1897, he was duly commissioned as such treasurer, and qualified according to law. The board of commissioners of said county, on August 5, 1897, appointed Albion Horrall treasurer of said county from August 5, 1897, to January 1, 1898, and he was duly commissioned and qualified according to law. Aikman refused to surrender the office to either said Wadsworth or Horrall, claiming that the term of office of Wadsworth did not commence under the act of 1897 (Acts 1897, p. 288), until January 1, 1898, and that he had the right to hold over under section 3, article 15 of the Constitution, being section 225 Burns 1894, 225 Horner 1897, until the commencement of Wadsworth's term, on January 1, 1898. Upon these facts, the questions being presented by demurrer to the complaint of appellee and cross-complaints of appellants, the court held that the relator's term of office commenced August 5, 1897, and rendered judgment accordingly.

It was held in the cases of *Scott v. State, ex rel.*, 151 Ind. 556; *State, ex rel., v. Harris, post*, 699, that the term of all treasurers elected at the general election of 1896, whose terms of office had not commenced when the act of 1897 (Acts 1897, p. 288), took effect, would commence under said act on the first day of January next following the expiration of the term of the treasurer in office when said act took effect. It follows, therefore, that the term of the relator Wadsworth, who was elected treasurer of said county at the general election of 1896, did not commence until January 1, 1898, and the court below erred in holding that he was entitled to said office on August 5, 1897. Section 2, article 6 of the Constitution, being section 152 Burns 1894, section 152 Horner 1897, creates the office of county treasurer and

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*Aikman v. State, ex rel.*

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fixes the term of office at two years, and provides that no treasurer shall be eligible to the office of treasurer more than four years in any period of six years.

It was held by this court, in *Gosman v. State, ex rel.*, 106 Ind. 203, that where one has held by election two consecutive terms of a county office, created, and the term of which is fixed by said section 2, article 6 of the Constitution, he cannot hold over after the expiration of his second term as fixed by said section, but at the expiration of the period for which he is eligible (which in the case of treasurer is four years in any period of six years) a vacancy arises which the board of commissioners may fill by appointment. It was also held that section 3, article 15 of the Constitution, being section 225 Burns 1894, section 225 Horner 1897, which provides "that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified," only affects the term of office, and has no relation to the qualifications or eligibility of any person to an office.

The expiration of the four years fixed by the Constitution during which appellant Aikman was eligible to the office of treasurer having destroyed his capacity to hold the office, his tenure was at an end. This is because his right to continue in office was dependent on his capacity or eligibility to hold.

It follows, therefore, that there was a vacancy in the office of treasurer of said county on August 5, 1897, which the board of commissioners was authorized to fill, and that appellant Horrall, the person appointed by said board to fill said vacancy, was entitled to hold said office until January 1, 1898, and until his successor was duly qualified.

Judgment reversed, with instructions to sustain the demurrer of appellant Aikman and the demurrer of appellant Horrall to the complaint, and to overrule all demurrers to the cross-complaint of Horrall, and for further proceedings not inconsistent with this opinion.

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 Hiatt v. Town of Darlington.
 

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HIATT, ET AL., TRUSTEES OF GLEN LODGE No. 149,  
INDEPENDENT ORDER OF ODD FELLOWS v.  
THE TOWN OF DARLINGTON.

[No. 18,608. Filed May 19, 1899.]

TOWNS.—*Annexation of Territory.—Order of County Commissioners.*

—*Collateral Attack.*—The board of county commissioners has jurisdiction to determine the sufficiency of a petition of town trustees, under section 4426 Burns 1894, for the annexation of territory, and where its record shows that the petition came on to be heard, and it was found that due notice had been given, such record is conclusive, and is not subject to collateral attack because of any irregularity in the election or qualification of the town trustees who petitioned for the annexation, or because of any failure to serve with notice some landowners within such territory. pp. 574-579.

SAME.—*Annexation of Territory.—Notice to Landowners.—Collateral Attack.*—Persons who were not served with notice of a proceeding for the annexation of territory to a town, as provided by section 4426 Burns 1894, but who unite in a joint attack thereon with others who were so served, cannot in that proceeding maintain the attack upon any grounds which are not available to their co-plaintiffs. pp. 574-579.

PLEADING.—*Answer.—Demurrer.*—Where a complaint fails to state a cause of action, it is never reversible error to overrule a demurrer to an answer thereto. p. 580.

SAME.—*Argumentative Denial.—Demurrer.*—A denial is not demurrable because argumentative. p. 580.

TOWNS.—*Annexation of Territory.—When Owners of Lands Estopped from Questioning Validity of Annexation Proceedings.*—Where an owner of territory annexed to a town stands by and permits the municipality to expend large sums of money in building streets, alleys, and sidewalks, enhancing the value of his property, he will be estopped from disputing the validity of annexation proceedings of which he had notice. pp. 580, 581.

SAME.—*Annexation of Territory.—Validity of Proceedings.*—The proceedings to annex territory to a town are not rendered invalid by the facts that the certificate of election of the town trustees presenting the petition was not filed until the validity of their acts had been called in question in another suit, which had been dismissed,

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that taxes paid by owners of the annexed land exceeded the improvements made thereon, and that the owners held in fee the cemetery lots in such land. p. 581.

From the Montgomery Circuit Court. *Affirmed.*

*Ballard & Ballard*, for appellants.

*Chas. Johnston* and *W. H. Johnston*, for appellee.

DOWLING, J.—The appellee, the town of Darlington, by T. M. Campbell, W. E. Wilson, and F. W. Campbell, acting as its board of trustees, on the 25th day of May, 1893, filed its petition with the board of commissioners of the county of Montgomery, in which county said town was situated, for the annexation of a tract of unplatted land contiguous to the town.

Campbell, Wilson, and Campbell were described in the petition as the board of trustees of the town, and they subscribed it in their official capacity. The petition conformed to the requirements of the statute. It was accompanied with a map accurately describing by metes and bounds the territory proposed to be attached, verified by affidavit, and it set out the names of the persons supposed to be the owners of the said land.

At the regular June term of the said board of commissioners, on the 8th day of June, 1893, the petition came on to be heard, and the board found that due notice of the same had been given by publication more than thirty days before the first day of said June term; that the persons named in said petition, among whom were the appellants herein, excepting John J. Kirkpatrick and Sabina Cozad, were the owners of the whole of the said territory; and that all of them had been served with notice of the pendency of the said petition. These facts appeared on the face of the record of the board.

No objection seems to have been made by any one, and the board rendered judgment granting the prayer of the petition; and it caused an entry to be made on its order-book,

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*Hiatt v. Town of Darlington.*

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specifying the territory annexed, with the boundaries thereof, according to the map and survey.

Subsequently the town in good faith caused streets, alleys, and sidewalks to be laid out and constructed in the territory so annexed, expending large sums of money therefor.

Four years after these proceedings of the board annexing said land, the appellants brought this suit in the Montgomery Circuit Court to have the said order of annexation declared void.

The complaint was in three paragraphs. The first, after setting out the proceedings for such annexation in detail, averred that the inspectors of the election at which the said Campbell, Wilson, and Campbell were elected such trustees of said town did not at any time after the said election make and file in the office of the clerk of the circuit court of Montgomery county a certificate of the election of the said Campbell, Wilson, and Campbell as such trustees.

The second paragraph, in addition to the formal matters contained in the first, alleged that no notice of the petition and proceedings for annexation of the territory in question was given to any of the owners thereof.

The third paragraph differs from the second only in the averment that no notice of the proceedings was served on John J. Kirkpatrick, one of the appellants, or upon some twenty-one other persons whose names are set out, all of whom, it is charged, were known resident owners of real estate within the territory annexed.

Demurrers to the several paragraphs of the complaint were overruled, and the defendant answered in four paragraphs. The first two were in denial. The third alleged that Campbell, Wilson, and Campbell were duly elected trustees of the town, and performed the duties required of them by law; that they filed the petition for the annexation of the said territory; that due notice was given to all the owners thereof; and that upon such petition the board of commissioners at their June term, 1893, made the order of annexation. It

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was further averred that on the 7th day of June, 1897, and before the commencement of this suit, the certificate of the election of the said Campbell, Wilson, and Campbell, as such trustees, was filed in the office of the clerk of Montgomery county.

The fourth paragraph of the answer averred, among other things, that all of the owners of the land sought to be annexed, including the appellants, were personally served with notice of the proceedings; that at its June term, 1893, the board of commissioners, with the knowledge of the appellants and of all the owners of the said land, made the order of annexation; that afterwards the said town, in good faith, and without knowledge of any defect in the proceedings for annexation, laid out and made improvements in the territory so annexed, consisting of streets, alleys, and sidewalks, and expended large sums of money therefor, and that it incurred a debt for a school building for the use of the school children of said town, including those in the territory annexed; that bonds were issued for said debt and were outstanding and unpaid; and that the appellants and the other owners of land within the boundaries of the territory annexed stood by without objection, and permitted said improvements to be made for the benefit of their property.

Demurrers to these answers were overruled.

The second paragraph of the answer being properly treated as an argumentative denial, replies were filed to the third and fourth paragraphs only.

The first paragraph of the reply to the third paragraph of the answer attempted to avoid the defense pleaded in that paragraph by alleging that the certificate of the election of Campbell, Wilson, and Campbell as trustees was not filed in the clerk's office until the validity of the official acts of the said Campbell, Wilson, and Campbell had been called in question by the appellants in another action between said town and said appellants.

The second paragraph of reply to the fourth paragraph of

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the answer averred that the total cost of the improvements made by the town in the territory annexed, did not equal the amount of general taxes paid to said town by appellants and the other owners of lands within the territory annexed, and that the debt for the school building was incurred without authority of law.

The third paragraph of the reply set up the same facts as were alleged in the second paragraph, with the additional statements that the only land owned by the appellant Glen Lodge No. 149, in said territory was a cemetery, which is not subject to taxation, and that the other owners objected to the issuing of the bonds by the town on account of the debt for the school building, and that appellee had knowledge of these facts.

The fourth paragraph of reply to the second paragraph of the answer alleged that the lots in the cemetery embraced in the territory annexed were held by the owners thereof in fee simple.

To each paragraph of the reply a demurrer was sustained, and the appellants refusing to plead further, judgment was rendered against them.

The errors assigned are the rulings of the court upon the demurrers to the second, third, and fourth paragraphs of the answer and to the second, third, and fourth paragraphs of the reply.

The question with which appellants are met at the threshold of this appeal is, are the proceedings of the board of commissioners in the matter of the annexation of the lands in controversy open to attack by them?

The section of the statute under which these proceedings were taken is as follows:

"When any town shall desire to annex contiguous territory thereto, not platted or recorded, the trustees shall present to the board of county commissioners a petition setting forth the reasons for such annexation, and shall accompany the same with a map or plat accurately describing by metes and

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bounds, the territory proposed to be attached, which shall be verified by affidavit. Such trustees shall give thirty days' notice, by publication in a newspaper printed in such town, if any; otherwise in the county, or, if none, then by posting up such notice in five or more public places within the corporation. A copy of such notice shall be served on the owner or owners of such territory, if known and residents of the county." Section 4426 Burns 1894, section 3389 Horner 1897.

The power and right of the board of commissioners of Montgomery county to hear and determine the petition of the town of Darlington for the annexation to the town of contiguous unplatted territory are not denied. Having jurisdiction of the subject-matter of the proceeding, did the board obtain jurisdiction of the persons of the owners of the territory proposed to be attached? The proceedings of the board which are set out at length in the complaint, disclose that all of the appellants, excepting possibly John J. Kirkpatrick and Sabina Cozad, were named in the petition for annexation as known resident owners of the territory to be attached, and that they were personally served with notice of the petition and proceedings. Even if Kirkpatrick and Cozad were not served they are in no better condition than the other appellants who were served. They have united with the other appellants. Their interests cannot be severed from those of their co-plaintiffs. The cause of action is entire, and if the complaint fails to show a good cause of action as to any of the plaintiffs, it is bad as to all. *Town of Cicero v. Williamson*, 91 Ind. 541; *Peters v. Guthrie*, 119 Ind. 44; *McIntosh v. Zaring*, 150 Ind. 301, and cases cited.

The appellants other than Kirkpatrick and Cozad cannot assail the proceedings because they were parties to them, and are shown to have been served with notice. Their only remedy was by appeal from the judgment of the board.

In *Board, etc., v. Hall*, 70 Ind. 469, it is said: "The filing of the petition calls into exercise the jurisdiction of the

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board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite number of freeholders of the township, but every other fact necessary to the granting of the prayer of the petition, including the due organization, under the laws of this State, of the company in whose favor aid is asked.

"By making the order granting the prayer of the petition, the board must be taken to have decided that the company was such a one as was, under the statute, entitled to aid; and if, in this respect, it has committed an error, the decision is, nevertheless, binding and conclusive, unless appealed from, and cannot be attacked collaterally, as by injunction upon the collection of the tax. These principles are well established by the authorities above cited upon the point, and by numerous others. See *Snelson v. State*, 16 Ind. 29; *Dequindre v. Williams*, 31 Ind. 444."

In *Town of Cicero v. Williamson*, 91 Ind. 541, the court say: "Where a petition, authenticated by the signatures of the town officers, and professing to be the petition of the town is filed with the board of commissioners, is adjudged sufficient, and judgment is entered annexing the contiguous territory, it will conclude taxpayers from raising, in a collateral attack, any questions as to the formality of the proceedings by the town trustees. Such questions are necessarily decided by the board of commissioners, and are, therefore, so conclusively adjudicated as not to be brought into consideration by a collateral attack. *Catterlin v. City of Frankfort*, 87 Ind. 45. \* \* \* Where notice is required before an inferior tribunal can act, and it does act, it is not essential that its records should show that it expressly adjudged the notice sufficient. The action does this by implication, and is enough to express the decision. *Board, etc., v. Hall*, 70 Ind. 469."

Again in *Stoddard v. Johnson, Treas.*, 75 Ind. 20, on page 30, it is said: "These authorities show further, that when an inferior tribunal is required to ascertain and decide

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upon facts essential to its jurisdiction, its determination thereon is conclusive as against collateral attack, and that, in such proceedings as that under consideration, the filing or presentation of the petition calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite land-owners, but every other fact necessary to the granting of the prayer of the petition; for instance, in this case, whether the proposed improvement, its kind, and the points between which it was to be made, and the like, were sufficiently stated. And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed. \* \* \* By the presentation of the petition, the judgment of the board upon its sufficiency was invoked, and their judgment in this respect, as much as in other respects, is exempt from collateral attack."

*Jones, Treas., v. Cullen*, 142 Ind. 335, was a suit to enjoin the treasurer of Rush county from collecting a tax levied upon the lands of the appellee and others in aid of the construction of a railroad. The principal question involved was the validity of an order of the board of commissioners making a donation to the railway company, and levying a special tax for the purpose of raising the sum donated. In speaking of the jurisdiction of the board, and the presumptions concerning it, the court say: "In the case at bar, as we have seen, the board of commissioners of Rush county had the exclusive original jurisdiction of the subject-matter of granting aid to railway companies by townships of that county; and it appears that this board at least assumed to, and did make, the orders which the appellee in this collateral proceeding now seeks to assail upon the ground that they are absolutely void. It follows, therefore, and we do so adjudge,

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that the jurisdiction of the commissioners' court over the subject-matter thus appearing, the same presumptions of regularity attend all of its particular proceedings in controversy that attach to those of a court of general jurisdiction. It will therefore be presumed in aid of the order upon a collateral attack against the same that every fact necessary to its validity existed. The power to decide, implies also the power to decide wrong as well as right. These principles of law are fully sustained by the following authorities: *Jackson v. Smith*, 120 Ind. 520; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405; *Van Fleet Coll. Att. pp.* 874, 875; *State, ex rel., v. Wolever*, 127 Ind. 306; *Turner v. Conkey*, 132 Ind. 248. 17 L. R. A. 509; *Alexander v. Gill*, 130 Ind. 485; *McLaughlin v. Etchison*, 127 Ind. 474; *Bass v. City of Fort Wayne*, 121 Ind. 389; *Otis v. DeBoer*, 116 Ind. 531. The question which seems to be the test of jurisdiction is—had the tribunal authority to act within range of the general subject? If it had, then there was jurisdiction. *Adams v. Harrington*, 114 Ind. 66; *Young, Tr., v. Wells*, 97 Ind. 410; *Tallman v. McCarty*, 11 Wis. 420; *Colton v. Beardsley*, 38 Barb. 29.

"The earlier decisions of this court on this point, among which are the case of *Hord v. Elliott*, 33 Ind. 220, and others cited by appellee, lay down a general rule which seemingly the court applied to orders and proceedings of boards of commissioners in each particular matter wherein exclusive original jurisdiction was conferred upon them. These decisions, we think, must be held and deemed to be modified and distinguished in the later cases to which we have referred. The principle that where a tribunal has jurisdiction of the general subject, its determination that facts essential to jurisdiction exist, is conclusive as against a collateral attack, has been asserted and enforced by this court in many cases, and has been held to apply to the acts of common councils as well as to boards of commissioners. See *City of Indianapolis v. Consumers, etc., Co.*, 140 Ind. 107, 27 L. R. A. 514, and authorities there cited."



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In *Denton v. Arnold*, 151 Ind. 188, the rule is thus stated: "Counsel for appellant urge that the answer is not sufficient, for the reason that it does not disclose that appellant was notified of the pendency of the petition to sell the real estate in the particular manner prescribed by the statute. It is alleged in the answer, however, that she was a party to the proceedings and that due notice was given to her of the pendency of said proceedings; and it further appears that the court assumed jurisdiction in the action, and ordered the sale of the land. This was an adjudication by the court upon the question of notice, and we must presume that the court did its duty, and found, before it rendered its judgment, that appellant as a party to the petition, had been duly notified thereof, as required by law. *First Nat. Bank v. Hanna, Adm.*, 12 Ind. App. 240; *Jackson v. State, ex rel.*, 104 Ind. 516; *Forsyth v. Wilcox*, 143 Ind. 144." See, also *Gold v. Pittsburgh, etc., R. Co.*, (Ind. Sup.) 53 N. E. 285, and cases cited.

It is evident from these authorities that the board of commissioners of Montgomery county had jurisdiction to determine the question of the sufficiency of the petition for the annexation of the territory, the competency and authority of the officers who signed it on behalf of the town of Darlington, and also the question whether the notice prescribed by the statute had been given, and whether the persons named as the owners of the land, including the appellants, had been properly served with notice. Not only does the action of the board indicate that it deemed that the petition was signed and presented by officers who had authority to represent the town, and that notice had been given to the owners of the land to be annexed, but the record of the board discloses that it expressly adjudged that such notice was given.

The appellants, the trustees of Glen Lodge No. 149, Independent Order of Odd Fellows, William N. Bowers, George Kashner, and Jordan H. Harris, were conclusively bound by the order and judgment of the board of commissioners in the

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annexation proceedings, and they cannot be heard to question its validity in this action.

As the complaint, therefore, did not state facts sufficient to constitute a cause of action as to all of the plaintiffs (if indeed, it was sufficient as to any of them), it was not error to overrule the demurrers to the answers, even if the answers were insufficient. A bad answer is good enough for a bad complaint. *Ice v. Ball*, 102 Ind. 42; *Reeves v. Howes*, 104 Ind. 435; *Low v. Studabaker*, 110 Ind. 57.

But we think the answers were good. The facts on which issues were tendered by each paragraph of the complaint were sufficiently confessed and avoided, or denied, by each paragraph of the answer.

The second paragraph of the answer was an argumentative denial. It was not error to overrule a demurrer to it. *Clauser v. Jones*, 100 Ind. 123; *Leary v. Moran*, 106 Ind. 560.

The third paragraph of the answer directly traversed all the allegations of the complaint as to the failure to notify appellants of the annexation proceedings, and it averred the filing of the certificate of the election of the trustees before the commencement of this action.

The fourth paragraph of the answer, in like manner, showed that notice was served on all the owners of the land annexed, and it also set up the fact that the appellants had stood by and permitted the appellee to lay out and make improvements in the territory attached, consisting of streets, alleys, and sidewalks, and to expend large sums of money therefor, that by these improvements, the value of the property of appellants was enhanced, and that such improvements were made in good faith, and with no knowledge that any defect in the proceedings for annexation existed.

These acts of the appellee described in the fourth paragraph of the answer were public, and were such that the resident owners of the land annexed were bound to take notice of them. Not only was the town corporation interested in them,

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but the individual citizens of the town, and of the territory annexed, were also liable to be influenced by them in the purchase and improvement of property with reference to such streets, alleys, and highways, as well as by the circumstance that the territory appeared to be within the corporate limits of the town, and therefore exempt from certain burdens, and entitled to many privileges and enjoying numerous advantages as a part of an incorporated town. As was said in *Strosser v. City of Fort Wayne*, 100 Ind. 443, "If a taxpayer were permitted long to acquiesce in the order of annexation, and then secure its overthrow, great confusion would ensue and much injustice be often done. High considerations of public policy and justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property should act with promptness and proceed with diligence, if he would resist the attempted annexation."

The matters pleaded in the several replies were not sufficient to avoid the answers. Their substance is set out elsewhere in this opinion, and need not be repeated. It is enough to say that the facts that the certificate of the election of the trustees was not filed until the validity of their acts had been called in question in another suit, which was dismissed, that the taxes paid by the appellants to the appellee equaled or exceeded the cost of the public improvements made in the territory annexed, and that the appellants were the owners in fee simple of the cemetery lots in the said territory were wholly immaterial. The demurrers to the four paragraphs of reply were therefore properly sustained.

But, as we have said, the first infirmity in the pleadings is found in the complaint, and the sufficiency or insufficiency of the subsequent pleadings is unimportant.

We find no errors in the rulings of the court, and the judgment is affirmed.

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152	582
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152	582
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**AMERICAN TRUST AND SAVINGS BANK ET AL. v.  
MCGETTIGAN, RECEIVER.**

[No. 17,779. Filed Feb. 17, 1899. Rehearing denied June 7, 1899.]

152	582
160	608

152	582
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170	696
170	697
170	700

**PLEADING.—Demurrer.—Receiver.**—A demurrer to a complaint by a receiver to cancel a mortgage existing on the trust property calls in question not only the sufficiency of the facts alleged to constitute a cause of action, but also the right of the receiver to maintain the action. *p. 586.*

**RECEIVERS.—Liens of Creditors.**—Where a court takes possession of the property of an insolvent corporation and appoints a receiver, it receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims and the standing of liens remain unaffected by the receivership. *p. 587.*

**MORTGAGE.—Record.—Validity.—Fraud.**—A mortgage executed by a corporation to secure a loan is valid as against existing creditors, although accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law. *pp. 588, 589.*

**SAME.—Action to Set Aside.—Receivers.**—A receiver cannot maintain an action on a complaint to set aside a mortgage existing on the trust property on the ground that the mortgage was not recorded, and that its execution was concealed, where the complaint shows upon its face that the relief sought is for the equal benefit of existing creditors and subsequent creditors without notice. *pp. 589, 590.*

From the Marion Circuit Court. *Reversed.*

*McBride & Denny, D. P. Baldwin, Mason & Latta and Blackledge & Thornton*, for appellants.

*Ayres & Jones, Miller, Winter & Blam and Elliott & Elliott*, for appellee.

**HADLEY, J.**—This suit was commenced by John E. McGettigan, receiver of the Premier Steel Company of Indianapolis, against the American Trust & Savings Bank of Chicago and the Bank of Commerce of Indianapolis, as trustees of a certain bond issue of said steel company, Henry E. Southwell *et al.*, to cancel the mortgage given by the Premier Steel Company to secure bonds issued by it to the amount of \$300,000. The substance of the complaint, after

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American Trust, etc., *Bank v. McGettigan*, Rec.

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certain formal allegations, is as follows: That the plaintiff was duly appointed the receiver of the Premier Steel Company by the Marion Circuit Court, and was by order of court authorized to bring this suit to test the validity of this mortgage; that on the 7th day of July, 1891, by a resolution of the board of directors, the president and secretary of the Premier Steel Company were directed to execute 300 bonds, of \$1,000 each, secured by mortgage on the property of the company, and to dispose of them to the best advantage; that the bonds, bearing date August 1, 1891, and a mortgage to secure the same, were signed by the president and secretary, covering the property of the company, which is described in the complaint; that said officers were not authorized by said company to pledge said bonds as collateral security for loans; that the bonds and mortgage were signed by the president and secretary (a copy of said mortgage being filed as a part of the complaint, as exhibit "A"), but the bonds were not sold or disposed of in any way, and the company thereafter held itself out as being possessed of the property free from encumbrance, and procured large loans and credits upon the strength of such representations; that on the 13th day of July, 1892, being then insolvent, and largely indebted for loans and credits obtained as aforesaid, all of which was at the time well known to defendant Southwell, and being at the time indebted to Southwell in the sum of \$20,000 upon two notes dated December 21, 1891, for \$10,000 each, payable one year after date, and having obtained from Southwell an additional loan of \$30,000 upon three notes of \$10,000 each, dated July 13, 1892, payable one year after date, all of said notes being indorsed by Charles W. DePauw, president and W. H. Coen, secretary and general manager, of said company, thereupon said general manager and said Southwell executed the agreement of that date, which is made a part of the complaint, and which is in the following words: "This memorandum of agreement, made this thirteenth day of July, A. D. 1892, between the Premier Steel Com-

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pany of Indianapolis, Indiana, and H. E. Southwell of Chicago, Illinois, witnesseth: Whereas, H. E. Southwell is now the holder and owner of five certain notes of the Premier Steel Company, for \$10,000 each, payable to the order of C. W. DePauw, and by him indorsed, payable one year after date, two of said notes being dated December 21, 1891, and three being dated July 13, 1892; and whereas, The Premier Steel Company has deposited with the American Trust & Savings Bank of Chicago, 300 of its six per cent gold bonds, of \$1,000 each, payable twenty years after date, secured by a mortgage deed on the property of said Premier Steel Company, dated August 1, 1891, *in escrow*: Now, it is hereby agreed between the parties hereto that said bank shall continue to hold said bonds and said mortgage deed, which deed has not been filed of record, upon the following understanding, to wit: That, whenever the owner of said notes shall feel himself insecure in regard to the same, then, upon his request, said bank shall file said trust deed for record, notice of said request to be given previously to said Premier Steel Company; otherwise, said bonds and trust deed to remain as at present until the payment of said notes. It is further agreed that if, at any time before the expiration of the aforesaid notes, said Premier Steel Company shall desire a further loan of \$50,000, and said Southwell shall not be able to furnish said amount, then the said trust deed shall be filed of record, and \$200,000 of said bonds shall be released to said steel company, the other \$100,000 remaining as security for the aforesaid notes. Witness our hand and seals the day and year above written. Premier Steel Company, by W. H. Coen, Sec'y & Gen'l Man'g'r. H. E. Southwell."

It is then averred that such secretary and general manager had no sufficient authority from said company to execute said agreement; that at the time said Southwell well knew that said company was insolvent, or in danger of insolvency; that said company was largely in debt, and intended and expected to buy large quantities of material upon credit, and

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American Trust, etc., *Bank v. McGettigan, Rec.*

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to borrow large sums of money, and incur large debts, to carry on its business and construct new and additional buildings, etc., all of which improvements to said property were by its terms to be covered by said mortgage; that, knowing that the business of said company was largely carried on upon credit, and that to record the mortgage would injure the credit of the company and prevent it from obtaining credit, and knowing that it was obtaining and was intending to obtain credit by holding out to the world that its property was free from encumbrance, said Southwell fraudulently agreed with said company to withhold said mortgage from the record for the purpose of permitting said Premier Steel Company fraudulently to hold itself out as being possessed of said property free of encumbrance; that thereafter said company contracted large debts; borrowed large sums of money, and obtained materials and property upon credit, upon such representations that its property was free from encumbrance, and that such credits and property could not have been obtained otherwise, and that a very large part of the indebtedness of said company now existing, to wit, more than \$100,000, is for loans and credits and property obtained after said agreement was made, and while the mortgage was so fraudulently withheld from the record; that the same was so fraudulently withheld until the 29th day of April, 1893, a few days prior to the appointment of said receiver, when said Southwell caused said mortgage to be placed on record; that said bonds have never been sold or in any way disposed of, except to place the same in the American Trust & Savings Bank aforesaid as security for said loans so made from Southwell; that, within a day or two before this receiver was appointed, said Charles W. DePauw, knowing that the receiver was about to be appointed, took possession of \$200,000 of the bonds, and still retains possession thereof, claiming that he is entitled to them for the benefit of the creditors of the company upon whose paper he is indorser, and that he has made a voluntary assignment to the Union Trust Company

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of Indianapolis; that said mortgage is an apparent lien upon said real estate, and casts a cloud upon the title of the plaintiff; that said Southwell claims that he has and holds a lien upon said real estate prior and superior to that of the plaintiff, and of the creditors aforesaid who gave credit to said Premier Steel Company upon the understanding that the property was free from encumbrance; that said Premier Steel Company is insolvent; that said Southwell ought not to be permitted to hold said mortgage as a lien prior to the rights of the creditors of said company who gave credit to said company upon the faith that said property was unencumbered as aforesaid; and that the said Charles W. DePauw and the Union Trust Company have no rights to or interest in said bonds. Prayer, that the mortgage be adjudged void and canceled; and that the title of the plaintiff to the property be quieted as against any claim of the defendants, and for all other proper relief.

The separate demurrers of the American Trust & Savings Bank and the Bank of Commerce, trustees, and Henry E. Southwell, to the complaint, were overruled. Answers to the complaint were filed, but, as no question is presented to this court upon them, they need not be noticed. The trustees filed a cross-complaint, in which they joined in asking a foreclosure of the mortgage. To the cross-complaint the receiver filed his separate answer, in five paragraphs. The first paragraph of answer covers substantially the same ground as the complaint. The second and third paragraphs present substantially the same facts pleaded in estoppel. The trustees filed demurrers to each the first, second, and third paragraphs of this answer. These demurrers were overruled.

The demurrers of appellants to the complaint call in question not only the sufficiency of the facts to constitute a cause of action, but also the right of the plaintiff to maintain the suit. *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257; *Farris v. Jones*, 112 Ind. 498.



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The first assault made upon the complaint is that the plaintiff cannot maintain this suit on behalf of all the creditors, as he shows by his complaint one class of creditors that has no right or equity that can be asserted against the mortgage. It is well established that when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver "is the arm of the court," by which it administers the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims, and the standing of liens remains unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it. *Gluck & Becker, Rec.*, section 6; 20 *Am. & Eng. Enc. of Law*, p. 407; *Woerishoffer v. North River, etc., Co.*, 99 N. Y. 398-402, 2 N. E. 47; *Hubbard v. Hamilton Bank*, 7 Metc. (Mass.) 340; *Minchin v. Nat. Bank*, 36 N. J. Eq. 436; *Snow v. Winslow*, 54 Iowa, 200, 6 N. W. 191; *Hale v. Frost*, 99 U. S. 389. And it is as much the duty of a receiver; in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors. He is strictly the officer of the court, and it is his duty so to conduct the business that the interests of all persons shall be protected. He should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *Gluck & Becker, Rec.*, sections 28, 48; *Nat. Bank, etc., v. Barnum, etc., Works*, 58 Mich. 315, 317, 24 N. W. 543; *Attorney-General v. Security Ins. Co.*, 79 N. Y. 267, 271. It is true, as asserted by counsel for appellants, that the right of the receiver to bring this action depends upon the right of the creditors represented by him to have united in bringing it, if no receiver had been appointed. The complaint and argument by appellee proceed upon the assumption that

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the appellee, in bringing it, was acting on behalf of all the creditors to set aside a fraudulent mortgage. In him all the creditors unite. His complaint is their joint complaint, in which they seek to have the mortgage adjudged absolutely void. They do not ask the court to recognize superior equities in the junior creditors, and for postponement of the mortgage to such equities, but insist that, upon the facts pleaded, the mortgage should be canceled and entirely swept away, and be held of no force and effect whatever as against or in favor of any one. If the complaint shows that the creditors could not join in such a complaint, it is bad.

It is a familiar rule of pleading that, when several persons join in an action, the complaint must show a good cause of action in all, or it is insufficient on demurrer for want of facts. *Brown v. Critchell*, 110 Ind. 31, 35; *Brumfield v. Drook*, 101 Ind. 190, 197; *Parker v. Small*, 58 Ind. 349, 352; *Maple v. Beach*, 43 Ind. 51, 59.

We do not doubt the receiver's right to maintain an action to set aside a mortgage when the facts pleaded by him show the mortgage to be void, or show it to be voidable at the suit of all the creditors. This court has so held (*Nat. Bank v. Nat. Bank*, 141 Ind. 352), and we are satisfied that the rule is correctly stated in that case. But this complaint does not present such a case. It is alleged that the Premier Steel Company, being "insolvent and largely indebted", entered into the agreement of July 13, 1892. Being "insolvent and largely indebted" implies that the steel company had existing creditors when the agreement of July 13th was executed. It also affirmatively appears that Southwell became a creditor for \$50,000 at the time of the agreement, and received from the company a preference it had the undoubted right to give.

It is shown that the security given was for an adequate consideration received,—that Southwell contributed to the estate of the debtor as much as he took away,—and it is not shown how the transaction in any way injured the previous creditors, or could operate to defraud them. The

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mortgage was valid, as against existing creditors, even though accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law. *Hutchinson v. Nat. Bank*, 133 Ind. 271, 281. A receiver, while acting for a court of conscience, must act impartially, and may not sequester the security of one creditor for the benefit of others who have no equity. The only persons, if any, injured by the alleged fraud, were the subsequent creditors without notice; and the receiver cannot maintain an action that shows upon the face of it, that the relief sought will place the creditors having an equity in a worse condition, and the creditors having no equity in a better condition, than they occupied before his appointment.

The complaint presents facts indicating a controversy among the creditors as to equities in the debtor's property. Its averments are not that the contract giving Southwell a security was fraudulent, or for any reason invalid, as against prior creditors, but that the agreement to withhold the mortgage from record was fraudulent against those who became creditors on the faith that the property was unencumbered. It discloses a controversy that cannot be fully adjudicated in the absence of the creditors holding conflicting equities. The case presented is one of distribution, to which all the creditors should be made parties, and permitted to implead each other, and have their equities defined. Equity seeks the administration of insolvent estates by the shortest and cheapest methods available, and, holding the estate *in custodia legis*, a court of equity will not clothe its receiver with authority to sue, or permit a creditor to sue, and involve the trust property in litigation, and expose the estate to costs and attorney's fees, if there is open any other complete remedy, less expensive, and more comprehensive in its subjects. In application of this principle, it becomes obvious that the courts below should not have authorized the cross-complainants to institute their cross-action to foreclose the mortgage.

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It goes but halfway. In it no equities can be adjudicated but those of parties. General creditors are not, and cannot be made, parties, unless possibly upon their own application. It may entail upon the estate heavy expenditures for costs. It implies a dispossession of the receiver, and sale by the sheriff; and it seems clear, in the interest of an economical administration of the trust, and a speedy settlement thereof, the court should order its receiver to sell the alleged mortgaged property free from liens of every character, under an order that all liens and claims should be transferred to the fund. This is but the exercise of a well recognized equitable power, and will bring all the creditors, all the beneficiaries of the fund, to a contest in its distribution, with ample opportunity to implead each other, and receive a full and complete adjudication of their equities.

The conclusion we have reached makes it unnecessary to review the alleged subsequent errors. The judgment is reversed, with instructions to sustain appellants' demurrers to the complaint, without leave to amend, and to order a dismissal of the consolidated cross-complaint, and for further proceedings in accordance with this opinion.

Dowling, J., was absent.

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INDIANA, ILLINOIS AND IOWA RAILROAD COMPANY  
v. BUNDY.

152	590
156	885
158	789
161	661

[No. 18,228. Filed March 5, 1899. Rehearing denied June 13, 1899.]

NEGLIGENCE.—*Assumption of Risk.*—*When Question of Fact.*—Plaintiff while coupling cars caught his foot in an exposed wire used in an interlocking switch device, and was injured. The evidence showed that plaintiff as brakeman had passed the switch at the place of the accident a number of times, but had not observed that the wires were unboxed; that at the time of the injury it was dark, and plaintiff had a lantern in his hand with which he was signaling the engineer in the movement of the train, and, being occupied in observing the movement of the train, he stepped in to make the coupling without noticing the wire along side the track; that the usual mode of constructing interlocking switch devices is to

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- leave the wires uncovered from the derail to the distant signals, but that in switch yards where a large amount of car handling is required the generally approved method is to box the wires at such places. *Held*, that the questions as to defendant's negligence and assumption of risk by plaintiff were properly submitted to the jury. pp. 592-597.

**EVIDENCE.—Personal Injuries.—Railroads.**—Where, in the trial of an action for damages on account of personal injuries sustained by plaintiff in catching his foot in an exposed wire used in an interlocking switch device while coupling cars, the court permitted defendant to show that other first-class roads constructed such switches in a similar manner, no error was committed in refusing it the right to show the particulars in the construction of such switches, other than upon its own road. p. 600.

**SAME.—Personal Injuries.—Railroads.**—In the trial of an action for a personal injury sustained by plaintiff in catching his foot on a wire used in a switching device while coupling cars, evidence of defendant's foreman of the switching crew that he had notified the superintendent prior to plaintiff's injury that the exposed wires were dangerous to men working around the track, and the superintendent's reply thereto, was properly admitted in evidence. p. 600.

**SAME.—Railroads.—Personal Injuries.—Rules of Company.**—Rules of a railroad company for the government and information of its employes are not admissible in evidence in the trial of an action against the railroad company for a personal injury to an employe, where it was not shown that plaintiff had ever received a copy of the rules. pp. 600, 601.

**INSTRUCTIONS.—Time of Presentation.—Appeal and Error.**—Defendant's exception to the refusal of the court to give instructions tendered is not prejudiced by a recital in the record showing that the instructions were offered and rejected before the close of the evidence. pp. 601-603.

**SAME.—Exception.—Marginal Notes.—Appeal and Error.**—An exception to the refusal of the court to give an instruction tendered by defendant is properly reserved by an indorsement on the margin thereof "refused and excepted to", although such marginal notes do not disclose which party excepted. pp. 603, 604.

**SAME.—Exception.—Marginal Notes.**—An exception to an instruction given by the court on its own motion by an indorsement on the margin thereof "given and excepted to" is not properly reserved, where it is not shown by the bill of exceptions that either party took or reserved exceptions to such instructions. pp. 604, 605.

**SAME.—Refusal to Give.**—The refusal of instructions is not error where the instructions offered were given in substance by the court on its own motion. pp. 605, 606.

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**NEGLIGENCE.—Railroads.—Construction of Switch Device.—Proof as to Similar Devices.**—A railroad company cannot establish freedom from negligence by showing the construction of its switch device to be similar to like devices upon another first-class railroad, without further showing, if the construction may be dangerous to employes at work about it, that it had given notice of the danger, or given the servant such an opportunity to observe it as would have put a reasonably prudent person on his guard. *p. 606.*

**INSTRUCTIONS.—Railroads.—Personal Injury.—Master and Servant.—Knowledge of Danger.**—An instruction in the trial of an action against a railroad company for injury to a brakeman caused by catching his foot in a wire used in connection with an interlocking switch device, to the effect that if plaintiff knew the method of operating interlocking switches he was bound to know the particular grounds occupied by the wires, is erroneous, where no reference is made to plaintiff's opportunity for observation or inquiry, or to the number of tracks at the place of the accident. *pp. 606, 607.*

From the Lake Circuit Court. *Affirmed.*

*F. S. Fancher* and *H. K. Wheeler*, for appellant.

*E. D. Crumpacker* and *G. Crumpacker*, for appellee.

**HADLEY, J.**—The evidence discloses that the appellant owned and operated a railroad extending from Streator, Illinois, to Knox, Indiana, and in connection therewith operated a leased line from Wheatfield, Indiana, a station on their main line, to North Buffalo, Michigan.

Appellee, who was plaintiff below, went into the employment of appellant in December, 1891, as a brakeman on a freight train, and continued in the same capacity till December 22, 1894, when, while attempting to couple cars in the switch yard at North Judson, Indiana, he fell over uncovered signal wires along the track, and his arm was caught between the deadwoods and crushed. North Judson is a station at which appellant's road, running east and west, is crossed by the Erie and Pan Handle Railways, running north and south, which three companies maintain at North Judson an interlocking switch device. The east signals on appellant's road are operated by two wires, less in size than telegraph wires, running eastward from the crossing on the

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south side of appellant's main track, 300 feet, to the derail. They at that point cross under the track to the north side, and thence extend eastward, parallel with, and forty-two inches from, the north rail of the main track, 1,200 feet, to the distant signal. These wires are boxed from the crossing to the derail. From that point eastward to the distant signal they are uncovered, and rest upon pulleys set in the tops of posts, three inches from the ground, and about forty feet apart. The ground over which the wires run is sandy. The operating wires are similarly constructed west of the crossing, except that on the west the wires are boxed for a distance of 360 feet. The appellant, among others, maintains a side-track south of its main track, east of the crossing, which extends to the eastward about 700 feet east of the distant signal, and, west of the crossing, a side-track on the north side of their main track, extending westward about half a mile, and about 1,000 feet west of the west distant signal. The Erie maintains "yards" on the east of the crossing, and the Pan Handle "yards" are on the west of the crossing, and north of appellant's tracks. The interchange of cars among these roads was so considerable as to make it necessary for appellant to maintain at this point a switch engine, and switching force of five men, including engineer and fireman. This switching crew performed all the switching at this point. It would collect the cars from the yards of the other two companies, and place them in train order,—those to go west on appellant's side-track above described west of the crossing, and those to go east on the side-track east of the crossing,—to be taken out by appellant's through freight trains from the west and east ends, respectively, of said side-tracks.

Soon after appellee's employment, in 1891, appellant constructed interlocking switches at Dwight and Momence, Illinois, and in September, 1892, constructed the one at North Judson, and also had a similar device at Magee and La Porte,

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on the New Buffalo branch. At these several points the wires from the derail to the distant signals were uncovered, and constructed in a manner similar to the one at North Judson. At Dwight the exposed wires were on the south side of the main track, and from a siding on the opposite side of the main track appellee had frequently coupled cars to his train, performing the work from each side of the side-track, but usually from the north side. At the other points where interlocking systems were maintained, except North Judson, no switching or coupling or uncoupling of cars was done in the vicinity of the exposed wires. For a period of two years after the construction of the interlocking systems, and next before the accident, appellee made from two to four trips a week over the road; two-thirds of the trips being from Streator to New Buffalo, and one-third to Knox, via North Judson, passing the latter place twenty-five or thirty times in daylight. His station in travel was on top of the train, or in the cupola of the caboose. The outside walls of the freight cars projected two and one-half feet outside the rails. Appellee was occasionally on the station platform at North Judson in daylight, but never walked on the ground along any part of the uncovered wires to reach the platform. The wires operating the switch and signals are boxed for 300 feet eastward from the station platform, and three hundred and sixty feet westward. Six days before the injury, appellant had opened an extension of its road to South Bend, and discontinued and removed its switching crew from North Judson, thus imposing upon train crews the duty of switching and picking up cars at the latter place. Appellee was returning from his third trip to South Bend and at 12:30 o'clock a. m., was called upon to couple a car to his train at a point from 325 to 340 feet east of the crossing. It was dark, and appellee had in his hand a lighted lantern, with which he twice signaled the engineer to back slowly, and, being occupied in observing the movement of the train, at the proper moment attempted to step in and make the coupling,



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but lodged his foot under the open wires, and, falling towards the train, threw himself forward in an effort to reach the deadwoods, to avoid falling across the rail; and thus his arm was caught between the deadwoods and crushed, making amputation above the elbow necessary. This was appellant's first attempt at coupling or uncoupling cars in that vicinity, or east of the crossing. He had never seen the open wires at that station. He had never been informed that they were open. He did not know they were open, and did believe they were all boxed, at that crossing. No objection to this complaint is urged by appellant, and the questions discussed all arise under the motion for a new trial. The negligence charged against the appellant is in maintaining the wires along the side of its road in an uncovered and exposed condition, at a point where its employes are required to go in to couple and uncouple cars. The insufficiency of the evidence to sustain the judgment below is urged by appellant.

It is a familiar rule that railroad companies are required to construct their roadways and appurtenances in such a manner as will enable their employes to perform the labor required of them with reasonable safety. *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378-385. This rule requires a railroad company, in any structure erected by it, to have regard for the safety of its employes while engaged in discharging their duties in relation thereto. The environments of the situation, the nature and extent of the services required of its employes, must have potent consideration, and such structure accomplished in a manner that has in view the highest degree of safety that ordinary care will provide. The appellant is excused if it maintains its roadway and appendages in a fashion generally approved and adopted by other first-class railroads of the country. But in this case the evidence tends to show that, while the general mode of constructing interlocking switch devices is to leave the wires uncovered from the derail to the distant signals, yet it also tends to prove that

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in switch yards, and places where a large amount of car handling is required, the generally approved, and usual method of first-class roads is to box the wires at such places. Without any doubt, the evidence is of a character to carry to the jury the question of appellant's negligence in maintaining uncovered wires at the place of appellee's injury.

Appellant further insists that, aside from the question of its negligence with respect to the open wires, there can be no recovery, for the reason that the danger, whatever it was, was apparent and known to appellee, and assumed by him, in his continued voluntary service with the company. It is a well established rule that one entering the service of a railroad company must do so with his eyes open, for he will be held to assume all the usual and obvious dangers incident to the employment. He must heed appearances and note consequences, and if, by his carelessness, he overlooks that which he might have observed by the exercise of ordinary care, his want of knowledge will be no excuse in case of injury. *Brazil Coal Co. v. Hoodlet*, 129 Ind. 327; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 573; *Cincinnati, etc., R. Co. v. Roesch*, 126 Ind. 445, 447; *Cincinnati, etc., R. Co. v. Lang*, 118 Ind. 579, 583. But, while the employe is thus held to diligence for his own safety, he has the right to repose confidence in the prudence and caution of his employer, and may rightfully presume that the employer, with respect to the same object, has performed his duty, and has invested all places and situation, with such safeguards as ordinary prudence require. *Baltimore, etc., R. Co. v. Rowan*, 104 Ind. 88; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156, and cases cited. The evidence adduced is not of a character to warrant this court in saying, as a matter of law, that the risk of the open wires was assumed by appellee. There was evidence that there were two light-colored wires, "less than telegraph wires," drawn over, and four inches above, a sandy roadbed. Appellee was a rear-end brakeman on a through freight

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train, and his post of duty in travel was on top of his train, or in the cupola of the caboose. The line of wires was twelve inches out from the outer walls of the moving freight cars, and not observable from the top of the train. Appellee had passed the wires twenty-five or thirty times in daylight, but before the accident had not been on the ground at any point along the uncovered wires east of the crossing, and did not know they were uncovered, and believed they were boxed. The wires were boxed with boards about eighteen inches wide on top, and six inches high, for a distance of 300 feet east and 360 feet west of the crossing. The boxed wires on the east side were on the south side of the main track for the first 300 feet from the crossing. Appellee had been several times on the station platform at the crossing, and had observed the boxed wires on the south side of the main track, but had not observed that the boxing ceased 300 feet to the east, or that at that point the wires crossed the main track to the north side, and proceeded thence eastward to the distant signal uncovered, and had not been notified, and did not know that such was the fact. The accident occurred about midnight. Appellee walked for some distance on the north side of the main track, along the exposed wires, about a rod distant, with a lighted lantern in his hand, to where the car stood that he was directed to couple to his train. He, and the backing train, arrived at the standing car about the same time. He signaled twice with his lantern to back slowly. His mind was absorbed in the moving train, and the exact moment when he must act to make the coupling. His line of vision at the time and place of the injury was necessarily above the wires. It is clear that upon these facts the question was with the jury to say, upon the whole evidence, whether appellee had assumed the risk of the open wires. *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39; *Indiana Car Co. v. Parker*, 100 Ind. 181, 197, and cases cited; *Rush v. Coal Bluff, etc., Co.*, 131 Ind. 135; *Evans v. Adams Express Co.*, 122 Ind. 362, 7 L. R. A. 678.

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Appellant cites numerous cases in support of its contention that the risk was an assumed one. But it must be borne in mind that the rule contended for is relative, and not absolute, and its application must be determined by what constitutes reasonable and ordinary care, under the facts of each particular case.

In the case of *New York, etc., R. Co. v. Ostman*, 146 Ind. 452, the plaintiff's decedent was killed by a cattle chute that stood within thirteen inches of the outer wall of a passing locomotive cab, and eight and a half feet high, with board wings and gates, and could be easily seen by the trainmen for a half mile in either direction. The deceased, as a locomotive fireman, had passed the chute twice each week for sixteen months, and had frequently aided in switching cars by it. At the time of his injury he was engaged in switching, and having carelessly thrust his head out of the cab window, and thus riding with his face to the rear, he collided with the chute and was killed.

In the case of the *Pennsylvania Co. v. Finney*, 145 Ind. 551, the injured party, from inattention, was knocked off the train by a water crane that stood seventeen feet high, and four feet from the track, and which he had passed almost daily for six months, and could see it for half a mile from either direction.

In the case of the *Wabash Paper Co. v. Webb*, 146 Ind. 303, the plaintiff was injured by being caught by a projecting oil cup and clutch on a revolving shaft. The shaft and projecting clutch were fully exposed. He had worked in the mill about two years, and about the particular machine for about three weeks, and had oiled the very clutch that caught him. In these and other cases cited, of similar import, the court held that the servant had assumed the risk, but the material facts in these cases are not analogous to the facts under consideration. The danger in these cases was easily apparent, was immediately present, and stood out so prominently as to press observation upon the servant of ordinary

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intelligence. We do not mean to say that, to charge the servant with an assumption of the risk, the evidence of danger must be as strong and cogent as it appears in these cases; but we do say that the presence of danger must be obvious from such appearances as will put a man of ordinary prudence and caution upon his guard, or the servant will be excused.

Duty had taken appellee along the exposed wires whereby he was hurt. He knew that the distant signals of interlocking switch devices were operated from the tower by wires, but, according to his testimony, his observation had been that the wires were covered through switching yards of other roads, and left exposed where no car handling was required. East of the crossing, and near the station platform, where he had been a number of times in daylight, the wires with which the eastern signals were operated were constructed on the south side of the main track, and boxed with boards from the crossing eastward for about eighteen rods. If any presumption will arise from this situation, it will be that the wires continue on the south side of the main track to the distant signal. Surely, under the evidence adduced, there could be no presumption arise that at a point about eighteen rods east of the crossing the wires ceased to be boxed, and there crossed from the south to the north side of the main track, and thence along the north side to the signal. Furthermore, it may well be doubted, if a person of ordinary vision, standing on the station platform, can see two light-colored wires, "less than telegraph wires," beginning 300 feet away, and stretched four inches above a sandy background, and, if possible to see them, whether the situation was such as to attract the attention of a man of ordinary caution to the fact. Appellee was not bound to know of latent perils, nor was he required to hunt after them, but he is exonerated if he heeded such cautionary manifestations as would put a man of ordinary prudence and caution upon inquiry. We think it is clear that the question of appellee's

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knowledge of the exposed wires, and his means of knowledge, by the exercise of reasonable caution, was a question for the jury.

Appellant insists that the court erred in denying it the right to show that other first-class roads had their interlocking switch devices constructed in the manner similar to the one in controversy. The court permitted appellant to give evidence touching the practice of railroads generally in the construction of interlocking switches, but denied it the right to show particulars in construction, other than upon the line of appellant's road. In this the court committed no error. *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 175; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Colf v. Chicago, etc., R. Co.*, 87 Wis. 273, 276, 58 N. W. 408. The court permitted, over appellant's objection, one Harvey, who was foreman of the switch crew at North Judson, and had worked over and about the open wires in question, to testify that prior to appellee's injury he repeatedly notified appellant's general superintendent that the exposed wires within the yard limits at North Judson were very dangerous to the men at work around and over them, and also to state the superintendent's reply. This decision of the court is fully supported by the case of *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 393, and cases there cited.

Appellant's rules 607 and 608 for the government and information of employes were offered in evidence. Appellant's learned counsel say in their brief: "These rules were offered in evidence for the purpose of showing that it was the duty of Bundy to examine the condition of all machinery, tools, tracks, cars, engines, or whatever he might undertake to work with, before he made use of the same, and ascertain their condition, for his own safety." The law required of Bundy such inspection and examination of all places and appliances where and with which he was put to work as a man of ordinary care and caution would make in a like situation,

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and it can hardly be claimed that the rules refused enjoined upon the employe a higher degree of care. Bundy, appellee, went into the service of the company in December, 1891, and the rules in question were promulgated in September, 1893. The evidence tended to show that the rules were printed on time-table number twenty-eight. Bundy, on cross-examination, denied that he ever received a copy of the rules, and claimed he never had, as his own, a copy of time-table twenty-eight, but sometimes got the conductor's, and had access to copies of said table to be found in the caboose. No effort was made by appellant to prove that a copy of the rules was ever given or tendered to Bundy, or his attention directed to them, except as was shown by his cross-examination, with result as indicated above. Neither was there any effort made by appellant to prove that Bundy had violated any provision of the rules offered. *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 173. Without some further evidence that appellee had received the rules, or had knowledge of their contents, the court was warranted in excluding the evidence.

Another reason for a new trial is that the court erred in refusing to give to the jury certain instructions, and in giving of its own motion certain other instructions. Appellee claims that the instructions asked by appellant and refused are not in the record, because prematurely presented. The recitals of the clerk in the record show that (December 4, 1896), "thereupon, before the argument, the defendant now tenders to the court, and asks the court to give to the jury at the proper time, certain written instructions, which are by the court refused, and the defendant separately excepts to each instruction refused to be given by the court; and said exceptions are indorsed on the margin of each of said instructions, and said exceptions are respectively signed by the court, and are thereupon ordered filed and made part of the record, without a bill of exceptions, and are in the words following." There follows twenty-one instructions, on the margin of each of which are these words: "Refused and ex-

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cepted to this December 4, 1896. Jno. H. Gillett, Judge;" and upon the same day, the further entry and recital, "And the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury, and each party at the time now excepts to each instruction given by the court to the jury, and their respective exceptions are noted upon the margin of said instructions, and respectively signed by the court, which instructions so given by the court, and the said exceptions thereto, are now likewise ordered filed, and made a part of the record herein, and the same are in the words following, to wit." Next follows thirteen instructions, with the words following indorsed on each; "Given and excepted to December 4, 1896. Jno. H. Gillett, Judge."

It is insisted by appellee that, since it appears from the first entry that "before the argument" the defendant tenders its instructions, and in the subsequent entry of the same day, that "the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury," we must construe the record as disclosing that appellant presented its instructions to the court, and obtained the court rulings thereon, and reserved exceptions, before the close of the evidence, and that inasmuch as the record does not show that appellant's instructions were again presented, rulings had, and exceptions reserved, after the close of the evidence, therefore it affirmatively appears that the tender of the instructions was untimely, and presents no question for this court.

We cannot agree with the learned counsel for appellee in this insistence. Even if this court was bound by the recitals of the clerk, we could not give the record the construction contended for. The recital is that "before the argument" (not before the close of the evidence) the defendant presented its instructions, to be given "at the proper time". And even if the tender was made before the evidence closed, as insisted, that will furnish no reason why appellant's right to



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exceptions should be prejudiced. The preparation of instructions is a delicate task, and should always be performed with deliberation and care, and should never be postponed till after the evidence is closed, only in exceptional cases, and as to exceptional facts. There are most excellent reasons why the fair and cautious attorney should prepare his instructions before, or during the progress of the trial, and tender them to the court at the earliest moment, that he may have time for full consideration. It is the duty of the court not to act adversely upon instructions until the evidence is all in, unless it seems clear that they are improper under any possible evidence, in which case, if the court, in fact acts, and indorses his refusal thereon, during the progress of the evidence, and subsequently withholds them from the jury, it cannot be said that the party thereby loses his right to exceptions, if timely taken. All inferences are in favor of the right action of the court, and, upon the record before us, we conclude that, without regard to the stage of the trial at which the instructions were presented, it was the duty of the court to act upon them, and that it did act upon them, in view of all the evidence, and that the exceptions reserved by appellant related to the act of the court, whenever that duty was actually performed, at any time before final submission.

It is further insisted by appellee that appellant failed to save exceptions to the refusal of the court to give to the jury the instructions asked. Section 544 Burns 1894, provides that it shall be sufficient to save exceptions by writing on the margin of each instruction the words, "Refused and excepted to," to be signed by the judge and dated. The instructions asked by appellant had indorsed on the margin of each: "Refused and excepted to December 4, 1896, John H. Gillett, Judge." It is true that these marginal notes do not disclose which party excepted, but it was a ruling that did not concern appellee, and one about which he could not complain, nor be entitled to an exception; hence, it must be held that they were the exceptions of appellant. The instructions

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asked by appellant and refused, and the exceptions thereto, are therefore properly in the record.

The instructions given by the court of its own motion are in the record, both by order of court and bill of exceptions, but it is urged by appellee that appellant has saved no exceptions thereto. Outside the recitals in the order-book set out above, no exceptions by either party appear anywhere in the record, except that there is written on the margin of each of the instructions so given to the jury, the following words: "Given and excepted to, December 4, 1896. John H. Gillett, Judge." Exceptions to instructions must be saved in the manner prescribed by statute, or by order of court or bill of exceptions. *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18; *Childress v. Callender*, 108 Ind. 394; *Fromlet v. Poor*, 3 Ind. App. 425, 430. Recitals in an order-book are not a statutory mode. Section 544 Burns 1894, *supra*. To be saved by a bill of exceptions or order of court, "what occurred in the way of exceptions to the giving of instructions must be stated in the bill or order as facts, and be authenticated by the signature of the judge." *McKinsey v. McKee*, 109 Ind. 209, 212. The bill of exceptions before us recites, "Be it remembered that at the proper time after argument the court, of its own motion, gave to the jury the following instructions, numbered one to fourteen, inclusive." Then follows fourteen instructions, each having written at the bottom the words: "Given and excepted to December 4, 1896. Jno. H. Gillett, Judge." And following the last are these words: "And these were all the instructions given by the court in the above entitled cause. Jno. H. Gillett, Judge Lake Circuit Court." Nowhere in the bill is it stated as a fact, or even recited that either party took or reserved exceptions. It therefore follows that we must look exclusively to the words, "Given and excepted to," written on the margin or at the bottom of each instruction, in determining the sufficiency of the exceptions. Without extrinsic support, there seems noth-

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ing for them to stand upon. Both parties were equally affected by the instructions, and both equally entitled to exceptions. But which party took them is not affirmatively shown. The law permits no such uncertainty in appeals. This court cannot be called upon to reverse the court below, unless error is clearly presented by the record, properly authenticated. *McKinsey v. McKee*, 109 Ind. 209, 212. To be sufficient to reserve exceptions to the giving of instructions, the marginal memoranda should also state the party in whose behalf the exceptions are allowed. The record discloses no exceptions on behalf of appellant to the instructions given by the court, and hence no question arises upon them in this court.

We come now to the final inquiry. Did the court err in refusing to give the jury the instructions asked by appellant? Numbers two, twelve, fifteen, and sixteen are the only ones discussed in appellant's brief. The second in substance, stated that the plaintiff charged in his complaint, that the defendant had two wires extending along the north side of its main track east of the crossing at North Judson; that said wires were uncovered and exposed, and that plaintiff had no knowledge, or means of knowledge, that said wires were uncovered; and that if the jury believed that the plaintiff frequently worked at North Judson, around and over said wires, and by the exercise of ordinary diligence he could have discovered them, then it makes no difference in this case whether or not he actually discovered them. The court informed the jury, in its number four, that a servant assumes not only the ordinary risks of the employment, but he also assumes every risk due to defective appliances of which he has knowledge, or of which he is put upon notice by circumstances coming to his knowledge, which would be reasonably calculated to put a person of ordinary prudence upon his guard as to the existence of such defects, and in number five charged: "If the plaintiff had actual knowledge that the uncovered wires were at the place where he was injured, that

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destroys his right of action. If he ought to have known of them, or been on his guard against them, the result must be the same." Reading numbers four and five together, they cover all the facts embraced in appellant's request number two, and more, and put the case in a light quite as favorable to the appellant as did its own, and quite as favorable as appellant was entitled to have it presented.

Appellant's request number twelve is as follows: "The court instructs the jury that if you believe from the evidence that the plaintiff received the injury complained of while coupling cars on the company's main track at North Judson, Indiana, then the defendant is required to construct its wires no better and safer along the main track than other first-class railroads constructed similar wires along its main tracks; and, if you believe from the evidence that other first-class railroads constructed such wires by leaving them open and exposed as the defendant did, then your verdict should be for the defendant." This falls short of an accurate statement of the law. It is too narrow. Appellant cannot establish freedom from negligence by showing a construction of its switch device to be similar to the construction of like devices upon another first-class railroad, without further showing, if the construction may be dangerous to employees at work about it, that it had given notice of the danger, or given the servant such an opportunity to observe it as would have put a reasonably prudent person upon his guard. Furthermore, the proper inquiry is not what other first-class railroad companies have done,—perhaps in exceptional instances,—but what is the general usage in this regard. This instruction contains no such limitation. Numbers fifteen and sixteen, state the same proposition in slightly different language, the substance of which is that if the jury believe that, prior to plaintiff's injury, he knew that an interlocking switch device was maintained by appellant at North Judson, and that it required wires to extend along the track for its operation, then he was bound to look, and see the wires extended

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along the track where he worked, and, if he fell over them and was injured, he cannot recover. This implies that if appellee knew the method of operating interlocking switches, and that one was at North Judson, then he was bound to know the particular ground occupied by the wires, without reference to appellee's opportunity for observation or inquiry, or to the number of tracks running east from the crossing, or the particular side of the track occupied, or appeared to be occupied from the only point of view ever had by appellee. Such a rule would utterly strip appellee of all protection afforded by ordinary prudent and cautious conduct in his situation. Numbers fifteen and sixteen were also rightfully refused. The instructions given by the court covered all the material facts and phases of the evidence, and stated the law applicable thereto with admirable precision and clearness. We have reviewed all of the alleged errors discussed by the learned counsel for appellant, and we find no error in the record. Judgment affirmed.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. BERRY.

[No. 18,898. Filed April 6, 1899. Rehearing denied June 13, 1899.]

**PLEADING.—Negligence.—Complaint.—Demurrer.**—A general allegation that defendant, a railroad company, carelessly and negligently permitted a heavy iron pin to be placed and to remain on the tender of its locomotive is sufficient to repel a demurrer in the absence of a statement of specific facts showing otherwise. pp. 609, 610.

**SAME.—When Pleading Not Sufficiently Specific.—Remedy.**—Where a complaint is not sufficiently specific the remedy is by motion. p. 612

**RAILROADS.—Operation of Trains on Track of Another Company.—Negligence.—Liability.**—A railroad company operating its trains on the track of another company is responsible for the negligence of its employes, whether in so operating its trains it is a trespasser, or is operating under a contract authorized by sections 1 and 3 of the act of March 10, 1878. pp. 610-613.

**SAME.—Injury to Employee Standing Near Passing Train.—Contributory Negligence.**—One in the employ of a railroad company, who is injured by an iron pin thrown from a passing train, is not shown to be guilty of contributory negligence by the finding of a special ver-

152	607
153	612
152	607
156	99
156	352
152	607
163	572

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dict that such employe knew the character of the train, when it was due, its usual rate of speed in passing that point, and before it came along stepped aside at least ten feet from the track, and that the place to which he withdrew was safe from risks that might reasonably be apprehended. *p. 613.*

**PRACTICE.**—*Motion for Judgment on Answers to Interrogatories.*—Where a motion for judgment on answers to interrogatories is general, the motion must be overruled if the answers are consistent with the general verdict under either paragraph of complaint. *p. 614.*

**RAILROAD.**—*Iron Pin Thrown from Tender of Passing Train.*—*Injury to Person Near Track.*—*Evidence.*—Evidence that an iron pin was thrown from the top of a locomotive tender running forty-two miles an hour, on a two-degree curve, on a smooth track, and struck plaintiff ten feet distant from the track and eight feet below the top of the tender does not support an allegation of the complaint that the pin was so thrown by the rapid motion of the train. *pp. 617, 618.*

**SAME.**—*Negligence.*—*Evidence.*—In an action against a railroad company for injuries to plaintiff, caused by an iron pin being thrown from the tender of a passing train by its speed, a verdict for plaintiff is not supported by evidence which does not disclose that the pin was on the tender in a position from which a reasonably prudent person would anticipate that it might be thrown off by the movement of the train, or that, if the pin were in a dangerous position, the defendant knew, or by the exercise of reasonable diligence might have known of it in time to have obviated the risk. *p. 618.*

From the Scott Circuit Court. *Reversed.*

*B. K. Elliott, J. T. Dye and C. E. Cowgill*, for appellant.

*J. B. Brown, J. H. Shea, E. Hough, A. G. Smith and C. A. Korbly*, for appellee.

**BAKER, J.**—Action to recover damages for personal injury. Appellee was inspector of track for the Baltimore and Ohio Southwestern Railway Company in Scott county. Appellant ran trains over this track. While appellee was engaged in his work, appellant's train approached. Appellee stepped aside ten feet from the track. As the train passed, going about forty miles an hour, a large iron pin came from the tender and hit appellee across the back.

Complaint in three paragraphs. Demurrer to each overruled. Answer of general denial. Jury returned general

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verdict for appellee on second and third paragraphs, and also answers to interrogatories. Appellant's motions for judgment notwithstanding, for new trial, and in arrest, were overruled.

Appellant insists that neither the second nor third paragraph sufficiently states negligence. The second paragraph charges: "That on the 28th day of July, 1896, while the plaintiff was at a point on said right of way about one mile south of Lexington, where his duties as aforesaid required him to be, having taken a position on the east side of and about ten feet from said railroad track, in order to permit a certain passenger train to pass, then and there being run and managed by said defendant's servants, he, the said plaintiff, was violently struck by a large, heavy iron pin, which had been carelessly and negligently permitted to be and remain on the tender of the locomotive attached to the defendant's said train, by the servants of said defendant, in such a manner that the motion of said train, which was being propelled at a very high rate of speed, threw said heavy iron pin off of said tender, where it had been carelessly and negligently permitted to be and remain by said defendant, striking the plaintiff." The third avers: "That the defendant negligently and carelessly suffered and permitted a large, heavy iron pin to be so placed on the tender of its aforesaid locomotive that said pin was by the speed of said train thrown off therefrom against the plaintiff."

The gist of the argument is that the complaint is bad because no allegation is made that it was dangerous to carry the iron pin on the tender; nor that the pin was placed or suffered to remain in an unsafe position; nor where one might reasonably expect that it would be thrown off by the movement or speed of the train. The complaint charges that the plaintiff was injured by the defendant's permitting the iron pin to be and remain (second paragraph) and to be placed (third paragraph) on the tender in such a manner that the movement

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of the train threw it from the tender against the plaintiff; and that this act, causing the injury, was "negligently" done. A general allegation of negligence is sufficient to repel a demurrer for want of facts. This means, not that the pleading is good by charging that the plaintiff was injured "by the negligence of the defendant", but that it is sufficient if the act, stated as the cause of the injury, is alleged to have been "negligently" done. Bliss on Code Pl. section 211 a; Works' Pr. & Pl. section 400; Black's Pl. in Ac. Cas. section 139; Maxwell on Code Pl. pp. 251-2; Bryant's Code Pl. pp. 336-7; Boone on Code Pl. section 174; Baylies on Code Pl. section 40. If the pleader goes beyond this general allegation and sets forth the specific facts that he claims made the act causing the injury negligent, the specific averments may overbear the general and render the pleading obnoxious to demurrer. A defendant is entitled to a statement of the specific facts; but, if the complaint does not contain it, his remedy is by motion. *Louisville, etc., R. Co. v. Bates*, 146 Ind. 564, and authorities there collated. The statements in *Weis v. City of Madison*, 75 Ind. 241 on page 246, 39 Am. R. 135, and in like cases, cited by appellant, to the effect that, if the facts pleaded do not in themselves show negligence, the qualifying adverbs, "carelessly" and "negligently" can not make up the insufficiency, apply not to complaints that rest upon the general allegation of negligence but to those that set forth the facts specifically.

Appellant urges, also, that each paragraph is bad by reason of this averment: "That the defendant was, on the 28th day of July, 1896, and had been for some time prior thereto, running its cars and locomotives over the track and right of way of the Baltimore and Ohio Southwestern Railway Company between North Vernon, Indiana, and Louisville, Kentucky". The contention is that, there being no allegation of a contract between the companies by which appellant had the right to control the operation of its trains over the other's road, the presumption arises that the latter company alone had author-



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ity to direct and control train operatives between the cities named (where the accident occurred); that this presumption overcomes the averment that appellant's servants were running the train in question; and that, therefore, the doctrine of *respondeat superior* does not apply to appellant.

In the case of *Atwood v. Chicago, etc., R. Co.*, 72 Fed. 447, it appears from the evidence (the complaint was silent in these particulars, but seems to have been held sufficient by reason of the allegation that the defendant "operated its trains between Kansas City and Topeka over the railroad of the Union Pacific Company") that the trains of the Rock Island Company were run between Kansas City and Topeka over the tracks of the Union Pacific Company under a contract in which it was agreed that the Union Pacific Company alone should make rules and regulations for the operation of all trains over its tracks between the points named and that the trains of both companies should move under and in accordance with the orders of the superintendent or train dispatcher of the Union Pacific Company. The Rock Island train was manned by employes hired and paid by that company. Atwood, a conductor of a Union Pacific train, was killed in a collision by the alleged negligence of the employes in charge of the Rock Island train. Held, that the employes in charge of the Rock Island train "were absolutely subject to the jurisdiction, control and direction of Union Pacific Company as to the manner and time of running over this track"; that the Rock Island Company could not be held on the doctrine of *respondeat superior* because the negligent employes were not at the time its servants; that "the responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant." To the same effect, also, are the cases of *Hitte v. Republican, etc., R. Co.*, 19 Neb. 620, 28 N. W. 284; *Byrne v. Kansas City, etc., R. Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; *Miller v. Minnesota, etc., R. Co.*, 76 Iowa, 655, 39 N. W.

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188; *Hilsdorf v. City of St. Louis*, 45 Mo. 94; *Town of Pawlet v. Rutland, etc., R. Co.*, 28 Vt. 297; *Dean v. East Tennessee, etc., R. Co.*, 98 Ala. 586, 13 South. 489; *Hardy v. Shedden Co.*, 78 Fed. 610, 24 C. C. A. 261, 37 L. R. A. 33.

The first and third sections of an act of March 10, 1873, read: "1. All railroad companies now organized or that may be hereafter organized under the laws of this State, having connecting roads, may enter into contracts by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon. 3. Every railroad company that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages occasioned by such locomotives and trains, in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same." Sections 3999, 4001 R. S. 1881 and Horner 1897, sections 5286, 5288 Burns 1894.

These statutory provisions become charter privileges and liabilities of railroad companies. Appellant had express authority to arrange with the Baltimore Company for the right to operate and control its own trains over the latter's tracks. In so operating, appellant would be as responsible as for its doings on its own right of way. If, under the statute, the two companies were empowered to make a contract by which the Baltimore Company would have exclusive control of the operatives in charge of appellant's trains while upon the Baltimore Company's tracks, so that appellant would not be liable for the negligence of the operatives, and if the complaint exhibited that appellant's train in question was operated under such a contract, the demurrer should have been

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sustained. The complaint does not allege that there was a contract at all. But the averment of appellant's continued operation of its trains over the Baltimore Company's road should favor the presumption that appellant was a lawful user of the tracks by permission rather than a trespasser. However, if the presumption be that appellant was a trespasser, it matters not; for a defendant's position is not bettered by having the complaint show that when he committed the wrongful act he was in a place where he had no right to be. The test question is not *where*, but *who*. Each paragraph of the complaint, far from showing that appellant surrendered control of its train to the Baltimore Company, directly charges appellant with the commission of the injurious act. The demurrers were properly overruled.

In support of the motion for judgment on the answers to interrogatories notwithstanding the general verdict, appellant urges that the answers show that the employes whose alleged negligence caused the injury were at the time under the control of the Baltimore Company, and not of appellant. There is no merit in the assignment in view of the general verdict and the answer to this interrogatory propounded by appellant itself: "Was not the defendant, at the time in question, operating its Louisville trains, including the train in question, from North Vernon to Jeffersonville, over the Baltimore and Ohio Southwestern Railroad? Answer, Yes."

Appellant also contends that the jury's answers establish appellee's contributory negligence. To numerous interrogatories, the jury answered in substance that appellee knew the character of the train in question, when it was due, and its usual rate of speed in passing the point where the accident occurred; that he saw this train approach at its usual speed, and before it came along stepped aside at least ten feet from the track; and that the place to which he withdrew was safe from risks that might reasonably be apprehended. These answers tend to sustain rather than to overthrow the general verdict.

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Appellant further insists that the jury's answers overbear the general verdict on appellant's negligence. Appellant relies upon the answers to five interrogatories in which the jury stated that the "evidence failed to show": (1) Who placed the pin upon the tender; (2) where the tender was when the pin was placed upon it; (3) when the pin was placed upon the tender; (4) whereabouts upon the tender the pin was placed; (5) what, if any, employe of appellant placed the pin upon the tender. The motion was general and therefore must be overruled if the answers to interrogatories are consistent with the general verdict under either paragraph of complaint. *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505; *Frazer v. Boss*, 66 Ind. 1; *Tucker v. Roach*, 139 Ind. 275. The fifth interrogatory was addressed to the issue tendered by the first paragraph of complaint, namely, that appellant's servants placed the pin upon the tender. The jury found in favor of appellant on this paragraph. The second and third paragraphs charge that appellee was injured by appellant's permitting the pin negligently "to be and remain" (second paragraph) and "to be placed" (third paragraph) on the tender in such a manner that the movement of the train threw it from the tender against appellee. Without considering whether or not there might be evidence admissible under the third paragraph whereby the general verdict would not be inconsistent with these answers, it may be noted that no interrogatory appears to be addressed to the issue made on the second paragraph. The jury, in answer to interrogatories, said that the fireman, prior to the accident, knew of and saw the pin upon his tender. Although there was no evidence showing when, where or by whom the pin was placed upon the tender, or where the tender was when the pin was placed upon it, yet it is conceivable that there may have been abundant evidence disclosing that the pin was permitted to be and remain on the tender for weeks before the accident happened; that, although it was not known whereabouts upon the tender the pin was placed when it was put

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there, the fireman, in shoveling coal or otherwise, caused it to become and to be and remain in a position from which it was likely to be thrown by the movement of the train in the manner alleged; and that the fireman knew of the dangerous position of the pin in ample time before the accident occurred to have obviated the peril. Appellant's motion for judgment was properly overruled.

Appellant presents the question that the verdict is not sustained by the evidence. A careful reading of the bill of exceptions discloses that appellee in his briefs has claimed for the evidence the utmost that can be claimed for it: "The burden of proving appellant's negligence in the use and custody of the coupling pin was upon appellee. He discharged that burden by proving that appellant had the pin upon the tender the day of the accident and permitted it to remain there in such position that it was by the motion of the train cast off against him, inflicting the injuries and causing the damage involved in this controversy." The testimony of appellant's witnesses was all to the effect that the pin was not upon the tender. There were no witnesses to the injury except appellee. He testified: "I saw the Big Four coming, and I was struck with that piece there,—that pin; I saw it coming and I tried to get out of the way, but I didn't make it quite. I saw it coming off the tender, something like the center of it; of course, I didn't have time to look at it, I just had time to turn half around. I was at least ten feet from the track at the time." There was evidence that similar pins were to be found at appellant's shops at Wabash; but there is not a scintilla of evidence that the pin in question was at any time or during a second of time upon the tender except the statement of appellee that he saw it coming from about the center of the tender. The evidence shows without dispute that the tender was about three-fourths full of coal; that there was an iron flange nine inches high around the top of the body of the tender; that the distance from the top of the flange to the rails of the track was nine feet; that the

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pin fell, in going from the flange of the tender to the person of appellee, a vertical distance of about eight feet; that the outer edge of the tender extended over the track about two feet; that the train was running about forty-two miles per hour on a two degree curve; that appellee was on the convex side of the curve. The jury also heard expert testimony as to the physical laws of motion.

No propulsion of the pin, except by the movement of the train, was pleaded. There was no evidence of an unusual or improper condition of the track or train, or of an unskilful handling of the engine, or of any motion of the tender except in the direction of and along the track. There was no explanation how a force could have been, or was, imparted to the pin sufficient to carry it over eight feet laterally while falling eight feet vertically; but there was the testimony of appellee only to the fact that the pin did come from the tender to that distance.

Does the rule *res ipsa loquitur* apply to this case? Does the accident itself bespeak the wrong of the appellant?

Actions in tort, to recover for injury to person or property, are divisible, according to the intent of the doer of the injury, into those based upon (1) wilfulness and (2) negligence. The latter class is subdivisible, according to the relative rights and duties of the doer and of the sufferer of the injury, into (1) cases in which the doer owes the sufferer a higher duty in relation to the causal act or omission than the sufferer owes the doer, that is, the doer is under a special absolute duty (which is not reciprocal) imposed by positive law or arising from the contract relation between the parties; and (2) cases in which the rights and duties of the doer and sufferer are coördinate and complementary. Pollock's Torts 19; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404. In cases within the latter subdivision, the parties are strangers—they stand at arm's length; each has the right to go about his own business, expecting the other to use due foresight not to injure him; each owes the other the duty of exercising due care

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to avoid injuring or being injured. If an action is based upon the breach of this duty, the plaintiff must aver and prove that the causal act or omission was one which a reasonably prudent person, in the defendant's place, would have foreseen might cause injury.

The present case is within this latter class. Appellee was upon the right of way of the Baltimore Company, under his employment by that company. Appellant had been running its trains over the Baltimore Company's track for a year before the accident, to appellee's knowledge. The parties were strangers. The relation between them was the same as if appellant had been on its own right of way and appellee upon a highway crossing.

The pin fell eight feet vertically in about one-fourth of a second. The train, at forty-two miles an hour, traversed in one-fourth of a second about fifteen feet. If the pin, when it fell from the tender had been affected only by the forces of gravity and the forward movement of the train, it would have traveled fifteen feet forward in line with the train while falling eight feet by gravitation. On the two degree curve, the track, at fifteen feet from the point of departure, was distant from the tangent about three inches. The pin's path of projection was the resultant of the forces applied. The three forces that have been mentioned could not have caused the pin to fly a distance of ten feet and more laterally from the track,—more than eight feet from the outer edge of the tender. Such a movement could only have resulted from the application of an additional force,—one sufficient to throw the pin, at right angles to the track, eight feet in one-fourth of a second. For the train to have furnished that force, it must have had a lateral velocity (and the consequent momentum) of more than thirty feet a second, more than twenty-one miles an hour, more than half its forward velocity and momentum. As to the cause of the pin's lateral motion, so far as this evidence is concerned, the train might as well have been standing still. The complaint attributes the fact that

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the pin was thrown more than ten feet laterally from the track entirely to the movement of the train. The evidence, disclosing nothing but appellant's train running properly on a smooth track of two degree curve and the unexplained lateral projection of the pin to a point more than ten feet from the track at a velocity greater than half that of the train's forward movement, does not support the complaint. A reasonably prudent person, in appellant's place, would not have apprehended such action of an inert iron pin under the conditions exhibited by this evidence.

Furthermore, the evidence does not disclose that the pin was on the tender in a position from which a reasonably prudent person would anticipate that it might be thrown at all by the movement of the train; nor does it show that, if the pin were in a dangerous place, appellant knew or by the exercise of reasonable diligence might have known of it in time to have obviated the risk.

In the class of cases to which this belongs, wherein the gist of the action lies in the failure of the defendant to exercise reasonable care, the maxim *res ipsa loquitur* can be allowed no broader scope than this: If the evidence which shows the injury discloses in itself that the defendant in relation to the causal act or omission did not exercise that degree of care which the law requires, the plaintiff has discharged the burden of proving negligence; otherwise not. *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404; *City of Warsaw v. Dunlap*, 112 Ind. 576; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 7 L. R. A. 588; *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647, 659; *Standard Oil Co. v. Helmick*, 148 Ind. 457, 466; *Schultz v. Chicago, etc., R. Co.*, 67 Wis. 616, 31 N. W. 321; *McGowan v. Chicago, etc., R. Co.*, 91 Wis. 147, 64 N. W. 891; *Case v. Chicago, etc., R. Co.*, 64 Iowa 762, 21 N. W. 30; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Cosulich v. Standard Oil Co.*, 122



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N. Y. 118, 25 N. E. 259; *Pierce v. Kyle*, 80 Fed. 865, 26 C. C. A. 201; 2 Jaggard Torts 938; *Millie v. Manhattan R. Co.*, 25 N. Y. Supp. 753.

The cases cited by appellee, in which the maxim is discussed, are in conformity with this conclusion. Without discussing them in detail, it may be said that in each case the evidence of the circumstances under which the plaintiff was injured disclosed a violation of a duty owing by defendant to plaintiff under those circumstances. *Kearney v. London, etc., R. Co.*, L. R. 5, Q. B. 411; *Byrne v. Boadle*, 2 H. & C. 722; *Gleeson v. Virginia, etc., R. Co.*, 140 U. S. 435; 11 Sup. Ct. 859; *Morris v. Strobel*, 30 N. Y. Supp. 571; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608; *Howser v. Cumberland, etc., R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154; *Maher v. Manhattan R. Co.*, 6 N. Y. Supp. 309; *Doyle v. Chicago, etc., R. Co.*, 77 Iowa 607, 42 N. W. 555; *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870; *Davis v. Ferris*, 53 N. Y. Supp. 571; *Thomas v. Jensen*, 86 Fed. 658, 30 C. C. A. 333; *Union Pacific R. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137; *Grimsley v. Hankins*, 46 Fed. 400; *Bartnik v. Erie R. Co.*, 55 N. Y. Supp. 266.

*Kearney v. London, etc., R. Co.*, *supra*, is considered a leading case, and may be taken as illustrative of the decisions. As Kearney was passing along a highway under a railway bridge of the defendant company, a brick fell out from the top of one of the brick pilasters on which one of the girders of the bridge rested, and injured him. A train had just passed previously. On the basis that the law required the plaintiff to introduce evidence sufficient to prove that the brick was in a condition, loosened from the pillar into which it had been built, whereby it was likely to fall, by the ordinary jarring of trains, upon persons passing under the

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bridge, and that the condition had continued for such a length of time that reasonable diligence in inspection would have disclosed it in time for defendant to have remedied the defect, it was held that, in the falling of the brick, considering the nature of the structure, evidence was afforded that the brick had become gradually loosened and that the defendant, if it had made a proper inspection from time to time, might have discovered its condition.

In each case, the proof must establish the existence of the defendant's negligence as charged. In this case, the evidence, as hereinbefore has been pointed out, does not sustain the complaint.

Judgment reversed, with instructions to sustain the motion for a new trial.

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## WARING ET AL. v. FLETCHER ET AL.

[No. 18,140. Filed Dec. 16, 1898. Rehearing denied June 14, 1899.]

**BONDS.—Attachment.—Construction.**—An undertaking in an attachment proceeding containing all the provisions required by statute is to be strictly construed in favor of the obligors the same as a bond containing such provisions would be in the absence of section 1235 Burns 1894 providing that a defective bond is to be read, construed, and enforced the same as if it contained all the conditions and provisions required by the statute. *pp. 624, 625.*

**SAME.—Attachment.—Construction.**—A condition in an undertaking in attachment duly to prosecute the proceedings in attachment, is simply a condition to prosecute the attachment proceedings to a final judgment, and is not the same as a condition to prosecute without delay, or diligently to prosecute. *p. 626.*

**ATTACHMENT.—Affidavit.—Proof.**—The grounds for attachment set forth in the affidavit in attachment are not taken as conclusive against the attachment defendant, but the same may be put in issue, and, to sustain the attachment proceedings, must be established by a preponderance of the evidence. *p. 626.*

**SAME.—Failure to Sustain Proceedings.—Action on Bond.**—Where the plaintiff fails to sustain his proceedings in attachment he is concluded from saying that such proceedings were not wrongful and oppressive, although he recovered judgment in the main action. *p. 626.*

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**ATTACHMENT.—Failure to File New Bond with Amended Complaint.**

—The failure of plaintiff to file a new undertaking in an attachment proceeding upon filing an amended complaint introducing a new cause of action cannot be questioned in an action on the bond after final judgment sustaining such new cause of action. *p. 627.*

**SAME.—Action on Bond.—Where Proceeding Was Wrongful and Oppressive in Part.**—The obligors in an undertaking in an attachment proceeding are not liable thereon where the proceeding was wrongful and oppressive in part. *pp. 627, 628.*

**SAME.—Action on Bond.—Judgment as to Part of Amount.—Wrongful Appeal.**—An attachment defendant is not entitled to a recovery on the undertaking on the ground that an appeal to the Supreme Court by the attachment plaintiff was wrongful and oppressive, where plaintiff obtained judgment in attachment as to part of the amount claimed, and appealed from the disallowance of the full amount, and the judgment as to the partial allowance was sustained. *pp. 627-630.*

**SAME.—Action on Bond.—Wrongful Appeal.—Effect of Appeal on Judgment.**—Where plaintiff obtained judgment in attachment as to part of the amount claimed, and appealed from the disallowance of the full amount, filing an ordinary appeal bond, such appeal will not suspend the operation of the judgment so far as it had the effect to release that part of the amount attached in excess of the judgment, and the attachment defendant is not entitled to recover on the attachment undertaking for the use of the amount attached in excess of the judgment during the time the case was pending in the Supreme Court, on the ground that the appeal was wrongful and oppressive. *pp. 630-633.*

**APPEAL.—Bond.—Attachment.**—That part of section 650 Burns 1894 relating to damages in an "appeal taken from a judgment for the recovery of real property or the possession thereof" or for "the recovery or return of personal property" has no application to an appeal from a judgment in a proceeding in attachment and garnishment. *pp. 632, 633.*

**ESTOPPEL.—Attachment.—Appeal.**—Defendant in an action on an attachment undertaking for damages for the loss of the use of property pending an appeal to the Supreme Court from a judgment disallowing part of a claim in attachment will not be estopped from denying the sufficiency of the appeal bond to hold the property by the mere fact that the property attached was not released pending the appeal. *pp. 633-635.*

From the Marion Circuit Court. *Affirmed.*

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*S. B. Davis* and *McNutt & McNutt*, for appellants.

*Ferdinand Winter*, for appellees.

McCABE, J.—Appellants brought this action against appellees on an undertaking in attachment. Appellees' demurrer to each paragraph of the amended complaint was sustained, and appellants refusing to plead further, judgment was rendered against them on demurrer.

The errors assigned call in question the action of the court in sustaining said demurrer.

It appears from the complaint that, on January 8, 1887, Fletcher & Company sued Waring Brothers, of London, England, in the Vigo Superior Court to recover \$35,000, the proceeds of the sale of certain railroad rolling stock. Affidavits in attachment and garnishment and the undertaking sued upon were filed.

It was alleged in the affidavit in attachment that the Warings were indebted to Fletcher & Company in the sum of \$35,000, as stated in the complaint, and that the claim was just, and that the plaintiff ought to recover \$35,000, and that the Warings were nonresidents of the State. The writ of attachment was returned "no property found." The persons served with the garnishee summons filed an answer admitting that they owed the Warings \$50,000. Said complaint was from time to time amended; and afterwards, on April 30, 1888, a sixth paragraph of complaint was filed in said action to recover on a claim which was in no manner embraced in the complaint filed in the beginning, when the attachment proceedings were instituted. No new affidavit in attachment or garnishment was filed upon said sixth paragraph, nor was any writ of attachment or garnishment taken out or issued when or after said sixth paragraph was filed. Afterwards, on July 22, 1889, the case was tried, and the court found for the plaintiffs in said action, and against the Waring Brothers, in the sum of \$2,783, on the claim sued upon in said sixth paragraph, and said sum was ordered to

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be paid by the garnishee defendants out of said \$50,000. As to the causes of action for the \$35,000, set forth in the other paragraphs of the complaint, the court found for the Waring Brothers, the defendants. The plaintiffs in said action, Fletcher & Company, filed a motion for a new trial, which was overruled, and they prayed an appeal to this court and filed their appeal bond. In this court they assigned as the sole error the overruling of the motion for a new trial. Afterwards, on March 4, 1894, the judgment of the court below was affirmed. *Fletcher v. Waring*, 137 Ind. 159.

It is alleged that the plaintiffs in said attachment proceeding did not duly prosecute said proceeding, but delayed upon various pretexts the due prosecution thereof; that they sued out said attachment upon false and fictitious claims, and by trivial amendments of their paragraphs of the complaint, predicated upon such fictitious claims, and by filing from time to time additional paragraphs to said original complaint, setting up other additional false, groundless, and fictitious claims, caused the repeated postponement of said cause and proceeding; that they delayed the trial for more than one year after the filing of said sixth paragraph of complaint, which alone of all the seven paragraphs of complaint contained any valid, just, and honest claim and cause of action as against the said Warings; that after the rendition of the final judgment, on July 22, 1889, and the appeal was perfected to this court, the attention of said attachment plaintiffs, who were appellants in said appeal, was called to the fact that no exception had been reserved to the action of the trial court in overruling their action for a new trial; but they still continued to insist upon said appeal, and delayed the hearing and the determination thereof by divers groundless proceedings to amend the record of the trial court so as to show an exception to the action of said court in overruling the motion for a new trial, and, failing in that, they insisted upon trivial, and therefore unheard of, and unprecedented, and wholly untenable, doctrines and rules of practice, because whereof two oral ar-

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guments became necessary, the personnel of said court having been changed during the repeated and continuous delays of said hearing by said appellants, so that said cause was not determined until March 27, 1894, more than four years after said appeal was taken, when said court held that said appellants' assignment of error presented no question, because no exception had been taken to the action of the trial court in overruling the motion for a new trial, and the judgment of the trial court was affirmed; that said proceedings in attachment and garnishment were wrongful and oppressive in this, that the claim for \$35,000, upon which the writs of attachment and garnishment were issued, were false, fictitious, and wholly without merit; that notwithstanding such fact, the plaintiffs in that proceeding demanded and procured by means of said proceedings the sum of \$50,000 of the money of said Warings, to be tied up in the hands of the garnishees, and obliged and compelled said Warings to incur, in order to protect said funds against said illegal and groundless claims of said plaintiffs in said action, large expenses in counsel fees, in taking depositions, and in paying other numerous expenses of their agents and counsel in and about the proper defense of said cause; amounting in all to more than \$10,000; that the seizure of \$50,000 to secure a claim of \$2,783 was wrongful and oppressive; that by said wrong and oppression the Warings were kept out of the use of \$46,500 of their money for the period of seven years and a half, and that the reasonable cost and income of said money was \$20,000.

The amended complaint was in four paragraphs. The first and third paragraphs allege breaches of both conditions of the bond, to wit, duly to prosecute the proceedings in attachment, and to pay all damages which should be sustained if the proceedings of plaintiffs should be wrongful or oppressive. The second and fourth paragraphs allege only a breach of the last named condition.

The theory of appellants is that, on account of the failure

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of the plaintiffs in the proceedings in attachment to sustain their claim for \$35,000, and procure an order against the garnishee to pay the same, they have the right to recover on the undertaking in attachment, notwithstanding the plaintiffs in said proceeding recovered judgment on the sixth paragraph of complaint for \$2,783, and an order against the garnishees to pay the same, and that they not only have the right to recover for the attorney's fees, and other expenses in the trial court, and for the loss of the use of the money during the time the proceeding was pending in the trial court, but also for the same expenses in the Supreme Court, and for being deprived of the use of the money during the time the case was pending on appeal in this court. The general rule that an undertaking in attachment is to be strictly construed in favor of the obligors has only been modified by section 1225 Burns 1894, section 1221 Horner 1897, to the extent that the bond, if defective, on a suggestion of such defect, is to be read, construed, and enforced the same as if it contained all the conditions and provisions required by the statute. But when the omissions, if any, in a bond are so supplied, the bond so read is *strictissimi juris*. The undertaking in attachment in this case is not defective, but contains all the provisions required by the statute, and the same is to be strictly construed in favor of the appellees, the obligors, the same as a bond containing such provisions would be in the absence of the statute. *City of Lafayette v. James*, 92 Ind. 240, 243, 244; *Burns v. Singer, etc., Co.*, 87 Ind. 541, 548; *Faulkner v. Brigel*, 101 Ind. 329, 332, 333; *Irwin v. Kilburn*, 104 Ind. 113, 115.

The condition of the undertaking in attachment, duly to prosecute the proceedings in attachment, is simply a condition to prosecute the attachment proceedings to a final judgment. Applying the rule of strict construction such condition is not the same as a condition to prosecute without delay, or diligently to prosecute. *Sannes v. Ross*, 105 Ind. 558,

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561. In this State the grounds for attachment set forth in the affidavit in attachment are not, as in some states, thereby established or taken as conclusive against the attachment defendant; but the same may be put in issue, and to sustain the attachment proceedings, the plaintiff must establish one or more of the grounds for attachment set out in the affidavit by a preponderance of the evidence. *McQuirk v. Cummings*, 54 Ind. 246; *Excelsior Fork Co. v. Lukens*, 38 Ind. 438; *Foster v. Dryfus*, 16 Ind. 158. Under this rule, if the plaintiff fails to sustain his proceedings in attachment, although he may recover judgment in the main action, he is concluded from saying that the proceedings in attachment were not wrongful and oppressive; and, on the other hand, if he recovers judgment upon the proceedings in attachment, as well as in the main action, the defendant is concluded thereby. In the case first stated the effect of the judgment is that the proceedings in attachment were rightful, and in the second case that they were wrongful and oppressive; and in each case the parties therein are conclusively bound thereby so long as the same remains in force. *Trentman v. Wiley*, 85 Ind. 33, 35; *Mitchell v. Mattingly*, 1 Metc. (Ky.) 237; *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Boatwright v. Stewart*, 37 Ark. 614; *Crandall v. Rickley*, 25 Minn. 119; *Pixley v. Reed*, 26 Minn. 80, 1 N. W. 800, Drake on Attach. (7th ed.), section 173 on p. 158; Waples on Attach. (2nd ed.) section 1023; 1 Shinn on Attach. pp. 313, 333; 3 Enc. Plead. and Prac., 651, 652. No action can be sustained on an undertaking in attachment in this State, therefore, if final judgment is rendered in favor of the plaintiff on the proceedings in attachment. *Hoshaw v. Hoshaw*, 8 Blackf. 258; *Trentman v. Wiley*, 85 Ind. 35; *Mitchell v. Mattingly*, *supra*; *Nolle v. Thompson*, *supra*; *Boatwright v. Stewart*, *supra*; *Tucker v. Adams*, 52 Ala. 254; *Crandall v. Rickley*, *supra*; *Pixley v. Reed*, *supra*; *Eckman v. Hammond*, 27 Neb. 611, 43 N. W. 397; *Kramer v. Thompson-Houston, etc., Co.*, 95



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N. C. 277; *Sloan v. McCracken*, 75 Lea (Tenn.) 626, Drake on Attach. (7th ed.), section 173, on p. 158; Waples on Attach. (2nd ed.), section 1023, 1 Shinn. on Attach. pp. 313, 333; 3 Enc. of Pl. & Prac. 651, 652; 2 Am. & Eng. Enc. of Law (1st ed.), section 466.

If it was necessary to file a new affidavit in attachment and garnishment, and a new undertaking in attachment, when the sixth paragraph of amended complaint was filed, in order to give the attachment plaintiffs the same lien and right against the funds therein garnisheed that they had as to the claims sued upon in the original complaint, when the writs were served, which we need not, and do not decide, yet, when the trial court, without such affidavit and undertaking being filed, made the finding sustaining the attachment and garnishment as to said sixth paragraph, and rendered judgment thereon accordingly, appellants were concluded thereby and cannot now call in question the correctness of said proceeding and judgment. Waples on Attach. section 1023, and the authorities above cited.

It is not material in this case whether or not the court erred in finding against the Warnings on the proceedings in attachment, and rendering judgment that the garnishees pay the judgment of \$2,787 recovered against the Warnings on the sixth paragraph of the amended complaint, because such judgment, even if erroneous, is binding upon appellants who were the attachment defendants in said action, until vacated or set aside. The court having adjudged that this was a debt for which the writ of attachment and garnishment issued, and rendered judgment against the attachment defendants, and ordered the garnishees to pay the same, found and adjudged thereby that the attachment proceedings were rightful, and not wrongful, and said appellants are concluded thereby from asserting the contrary. The provisions of the undertaking in attachment do not by their terms include a case where the proceedings in attachment are wrongful and oppressive in part; and, under the rule of construction appli-

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cable to such bonds, we cannot extend the language so as to embrace such a case. To do so would be to impose upon the persons executing such an undertaking a condition beyond the language used therein.

As was said in *Marx v. Leinkauff*, 93 Ala. 453, at p. 464, 9 South. 820, "the suing out of an attachment cannot be both wrongful and rightful at the same time, or *pro tanto* wrong. If the suing out of the attachment was not wholly wrongful, plaintiff could not recover for a wrongful suing out of the attachment." See, also, *Sheldon v. Sabin*, 17 N. Y. W. Dig., 105, 106. *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577, is cited as holding the contrary doctrine; but we are unable to determine from the report of the case that it was an action on an attachment bond, or that any judgment had been rendered sustaining the attachment proceedings. It would seem that in Texas, as in some other states, there is no trial in the attachment proceedings of the question of whether the grounds of attachment exist, but such grounds are taken as true in the trial of the attachment proceedings, and in an action on the attachment bond the untruth of the grounds upon which the attachment writ was issued must be shown. If such is the rule, the case cited would not be in point here. But if the law is there, as here, as to conclusiveness of the judgment in the attachment proceeding, and that was an action on the bond, we cannot follow it, because under such conditions it is not sustained by the authorities and does not meet our approval. It was held in *City Nat. Bank v. Jeffries*, 73 Ala. 183, 192, that if there is an abuse of process in the execution of the attachment, and the proceedings in attachment were sustained, that such an abuse would be a wrong for which no redress could be obtained by a suit on the undertaking in attachment. But if damages could be recovered in such case on the undertaking, or otherwise, for suing out the writ for an amount largely in excess of the actual debt, where the proceedings in attachment have been sustained, it must be alleged and proved that the same was done maliciously, and

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without probable cause. *Savage v. Brewer*, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; *Moody v. Duetsch*, 85 Mo. 237; *Tucker v. Adams*, 52 Ala. 254, 256, and cases cited; *Eslava v. Jones*, 83 Ala. 139, 3 South. 317, 3 Am. St. 699, 701; *Benson v. McCoy* 36 Ala. 710; *Whipple v. Fuller*, 11 Conn. 581, 584, 29 Am. Dec. 330; *Emerson v. Cochran*, 111 Pa. St. 619, 622, and cases cited, 4 Atl. 498; *Eberly v. Rupp*, 90 Pa. St. 259; *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. 533, 541, 545; *Nix v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. 434; note to *Pope v. Pollock*, (Ohio) 4 L. R. A. 256, 21 N. E. 356; *Doctor v. Riedel*, 96 Wis. 158, 71 N. W. 119, 37 L. R. A. 580; *Juchter v. Boehm*, 67 Ga. 534, 538; Hilliard on Torts (4th ed.) 456. The complaint contains no such allegation.

It is insisted by appellants that, under the facts alleged in the complaint, the proceeding in the Supreme Court was wholly wrongful and oppressive, and that they are entitled to recover the damage therefor on the undertaking in attachment. It may be true, as contended by appellants, that when the finding and judgment of the trial court are against the defendant in the main action, and also in the proceedings in attachment, and on appeal by said defendant said judgment is reversed, and on return of the cause to the trial court final judgment is rendered on the attachment proceedings in favor of the defendant thereto, that the undertaking in attachment would cover the damages on appeal as well as in the trial court; but it does not follow therefrom that appellants are entitled to recover on the undertaking in attachment in this case, if the proceedings on appeal were wrongful and oppressive. The judgment of the trial court against appellants on the proceedings in attachment was not reversed on appeal, but was affirmed, and the final judgment in said case was that of the trial court, appealed from, which was against appellants on the proceedings in attachment. *State v. Krug*, 94 Ind. 366, 371, and cases cited. It is evident, therefore, that there is no liability on the undertaking in attachment,

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even if the proceeding on appeal was wrongful and oppressive. Moreover, when the judgment for \$2,783 was rendered by the trial court against the Warings, and the garnishees ordered to pay the same, all of the sum garnisheered was released and discharged thereby, except an amount sufficient to pay said judgment and cost. Appellants were entitled to receive the same from the garnishee at once, if the same was due. *Lowry v. McGee*, 75 Ind. 508, 510, and cases cited; *Smith v. Scott*, 86 Ind. 346, 350; *Sannes v. Ross*, 105 Ind. 558, 560; *Emery v. Royal*, 117 Ind. 299.

In this State an appeal to the Supreme or Appellate Court, without filing an appeal bond, does not, as in some states, suspend the judgment from which the appeal is taken; nor does the filing of an appeal bond suspend the operation of such judgment except that it stays execution thereon. For all other purposes the judgment appealed from, even if an appeal bond is filed, is as effective and binding upon the parties as if no appeal had been taken. *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411; *Burton v. Reeds*, 20 Ind. 87; *Burton v. Burton*, 28 Ind. 342; *Walls v. Palmer*, 64 Ind. 493; *State v. Chase*, 41 Ind. 356; *Randles v. Randles*, 67 Ind. 434, 437, 440; *State v. Krug*, 94 Ind. 366, on p. 371, and cases cited; *Central, etc., Co. v. State*, 110 Ind. 203, and cases cited.

In *State v. Chase, supra*, a temporary injunction had been awarded against Matthews at the suit of Duncan. From this order Matthews appealed to this court, and filed his appeal bond within the time allowed by law, and, while said appeal was pending, Matthews violated said temporary injunction by doing the things forbidden thereby. He was thereupon arrested and punished for contempt of court, and this court held that the order for the injunction remained in full force and effect notwithstanding said appeal, and that Matthews was properly punished for violating the same. *Central, etc., Co. v. State*, 110 Ind. 203, is to the same effect.

In *Walls v. Palmer*, 64 Ind. 493, it was held that one who

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had by the judgment of a court been suspended from practicing his profession as attorney at law, and had appealed from said judgment to this court, and filed his appeal bond and otherwise perfected his appeal, was not entitled to practice his profession in said court during the pendency of said appeal. The court, in speaking of the effect of the appeal and appeal bond, said: "It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms; it executes itself, except as to the collection of costs, which is stayed by the appeal and supersedeas. The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken."

In *Randles v. Randles*, 67 Ind. 434, it was held that one to whom land has been set off by a decree of partition may recover possession thereof from a co-party in such partition suit during the pendency of an appeal taken by such co-party from such decree to this court, even though an appeal bond has been filed. The court, at p. 439 said: "The final judgment in a partition suit, in so far as it awards to each of the parties interested his or her share, in severalty, of the real estate in controversy, is self-executing; it requires no execution to enforce the terms of the judgment, but the rights of the parties, in severalty, are thereby fixed and absolutely determined, without process thereon of any kind, unless and until the judgment should be annulled, reversed or set aside. It is very clear, therefore, that the appeal of the appellant and his co-appellants, in the partition suit, from the judgment of the circuit court therein to this court, although such appeal had been duly perfected by the filing of the requisite appeal bond, did not in any manner affect or change the rights, in severalty, of the parties to such suit, in and to the lands assigned to them respectively, by the terms of such judgment; but, notwithstanding such perfected appeal, each of the parties to such suit, as between him or her and the

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other parties, owned and held the lands assigned to him or her, in severalty, in and by such judgment, until the same should be reversed or annulled. In other words, it seems to us, that the only effect of the filing of the appeal bond, on the appeal to this court from the judgment of the circuit court in the partition suit, was to stay execution upon the judgment for the costs of such suit, until such appeal was determined; and that in all other respects the judgment, until annulled or reversed, was binding upon the parties thereto, as to every question directly decided therein."

So, in this attachment case, the effect of the judgment was to release and discharge all of the indebtedness garnisheed, except sufficient to pay the judgment for \$2,783 and costs, and no execution or other writ was necessary to effect such release and discharge; as to this the judgment executed itself. *Thomas v. Johnson*, 137 Ind. 244.

An appeal by an attachment plaintiff from such a judgment with the ordinary appeal bond, no matter how large the penalty thereof, conditioned as required by the statute for such bond, could not therefore suspend the operation of said judgment so far as it had the effect to release and discharge the indebtedness in excess of the amount required to pay the judgment and cost. This could only be done, if at all, by a special supersedeas, when a proper bond was filed, as provided in such writ or order. The facts alleged in the complaint, however, do not show that any such supersedeas was issued, or bond filed.

It is alleged in the complaint that the payment of the money to the Warings was prevented by the filing of the appeal bond. This, however, is a mere conclusion. The facts from which the conclusion was drawn should have been averred, and from such facts the court would determine whether or not the bond had the legal effect alleged, for there is no presumption that the bond filed was not the ordinary appeal bond provided for by either section 650 Burns 1894,

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section 638 Horner 1897, or sections 653, 654 Burns 1894, sections 641, 642 Horner 1897.

A part of section 650, 638, *supra*, reads as follows, "And if the appeal is taken from a judgment for the recovery of real property, or the possession thereof, by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide that the appellant shall also pay all damages which may be sustained by the appellee for the *mesne* profits, waste, or damage to the land during the pendency of the appeal; and if from a judgment for the recovery or return of personal property, or for such property or its value, then, that if he deliver or return the property he will also pay the reasonable value of its use and any damage it may sustain during the pendency of an appeal."

It is claimed by appellants that the appeal bond required thereby was sufficient to hold the funds garnisheed during the appeal without a special supersedeas. The part of said section above quoted has reference alone to bonds executed when an "appeal is taken from a judgment for the recovery of real property or the possession thereof" or for "the recovery or return of personal property." This is the express language of the part of said section quoted, and it needs no interpretation; the mere reading is sufficient to show that it can have no application whatever to an appeal from a judgment in a proceeding in attachment or garnishment.

It is manifest that, notwithstanding the appeal from the judgment rendered by the Vigo Superior Court, and the bond filed therein, that the effect of the judgment in releasing and discharging the attachment and garnishment as to the indebtedness in excess of the amount required to pay the same, was not suspended, and appellants were entitled to receive said excess from the persons owing the same at all times after the rendition of judgment by the trial court.

Appellants insist that, as the appeal bond accomplished its purpose, and the money was held during the pendency of

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the appeal, appellees cannot deny that it was sufficient to hold the money while the appeal was pending in this court. This alone is not sufficient to entitle appellants successfully to invoke the doctrine of estoppel. The appeal bond, however, as we have shown, did not hold the money, or restrain the garnishees from paying the same to the Warings. If the garnishee retained the money in excess of the amount necessary to pay the judgment and order against them, it was not because appellants were not entitled to collect the same, but because they failed to enforce their rights. If there are any facts which would estop the obligors in the appeal bond from asserting that the same did not prevent appellants from enforcing payment by the garnishees, they have not been set forth in the complaint. The time to determine the question of estoppel suggested will be when it is presented in an action on the appeal bond.

It follows from what we have said, and from the authorities cited, that when the trial court sustained the proceeding in attachment, and rendered judgment for a part of the amount sued for, and that the same should be paid by the garnishee defendants, although the sum was much less than the amount which the attachment plaintiffs stated in their affidavit in attachment that they "believed they ought to recover," this concluded appellants from claiming that any condition of said undertaking in attachment was broken, and from maintaining any action thereon.

It may be that when a party to a judgment prosecutes an appeal to the Supreme or Appellate Court maliciously, and without probable cause, that an action will lie against him for malicious prosecution, the same as in a civil case so prosecuted in a trial court. *McCardle v. McGinley*, 86 Ind. 538, 44 Am. R. 343, and cases cited; *Carey v. Sheets*, 67 Ind. 375; *Coffey v. Myers*, 84 Ind. 105; *Lockenour v. Sides*, 57 Ind. 360, 26 Am. R. 58, 18 C. L. J. 242, 32 A. L. J. pp. 124, 145. But no such cause of action is stated in the complaint. It is manifest that the remedy, if any, for the alleged wrongs



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complained of by appellants, is not upon the undertaking in attachment, but must be sought elsewhere. Judgment affirmed.

## KENNER ET AL. v. WHITELOCK, RECEIVER, ET AL.

[No. 18,465. Filed Mar. 14, 1899 Rehearing denied June 14, 1899.]

**PLEADING.—***Questioned First Time on Appeal.—Building and Loan Association.*—A defect in a complaint in an action to foreclose a mortgage in favor of a building and loan association on account of the failure to file a copy of the constitution and by-laws therewith is cured by a finding and judgment for plaintiff, and cannot be presented for the first time on appeal. p. 636.

**BUILDING AND LOAN ASSOCIATIONS.—***Items Charged Borrowing Members.*—A building and loan association is only authorized by law to charge its borrowing members with dues, assessments, and fines, and premium and interest on loans, and cannot charge interest on dues, assessments, and fines. p. 636, 637.

**ATTORNEY AND CLIENT.—***Attorney's Fees.*—Where attorney is employed to collect a note containing an agreement for the payment of attorney's fees, the fees when recovered belong to the client, and the client must pay the attorney whatever fees have been agreed upon between them, or in the absence of an agreement such fees as are just and reasonable. p. 637.

**CORPORATIONS.—***Officers.—Services Outside Official Duties.—Compensation.*—The claim of an officer of a corporation for services rendered by him beyond the scope of his official duty may be allowed, where no element of fraud or dishonesty is involved. pp. 637, 638.

From the Huntington Circuit Court. *Reversed.*

*J. Q. Cline and U. S. Lesh*, for appellants.

*Whitelock & Cook, France & Dungan, Spencer & Bran-  
yan and J. M. Hatfield*, for appellees.

**DOWLING, J.**—Action to foreclose a mortgage executed by appellants to the Citizens Building, Loan & Savings Association. The debt intended to be secured was evidenced by the note of the appellant, James B. Kenner, and its consideration was a loan made to him by the association. Issues were formed upon the pleadings (including a set-off and counter-claim filed by appellant, James B. Kenner); there was a trial by the court, and a finding for the appellee, Whitelock,

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receiver, etc. A motion for a new trial was made by appellants and overruled, to which decision appellants severally excepted. Judgment upon the finding.

The errors assigned call in question the sufficiency of the complaint, and the decision of the court upon the motion for a new trial.

No objection to the complaint was taken by demurrer, and the only defect now pointed out is the failure to file with that pleading certain exhibits, consisting of the constitution and by-laws of the association. This objection comes too late. The defect in the pleading on account of the failure to file the exhibits was cured by the finding, and it cannot be presented for the first time on an assignment of error. *Purdue v. Stevenson*, 54 Ind. 161; *Eigenmann v. Backof*, 56 Ind. 594; *Scott v. Zartman*, 61 Ind. 328; *Galvin v. Woollen*, 66 Ind. 464; *Owen Tp. v. Hay*, 107 Ind. 351; Elliott's App. Proc. section 473, note 2.

Among the reasons for a new trial it is alleged that there was error in the assessment of the amount of the recovery, in that the assessment was too large. It is evident from an examination of the record that such error existed. In the computation of the amount of the finding, James B. Kenner, the maker of the note and the holder of the stock, is charged with these items: *Interest on weekly dues* to Nov. 12, 1891, \$149.60; *Interest on dues* amounting to \$805 from Nov. 12, 1891, to date of finding, Dec. 14, 1895, \$193.20; *Interest on fines* amounting to \$322 for 161 weeks to Nov. 12, 1891, \$59.81; *Interest on fines* from Nov. 12, 1891, to date of finding, Dec. 14, 1895, \$78.89.

The statute under which the association was organized authorized it to charge its borrowing members with premiums on loans, interest on loans, and with dues, assessments, and fines. We find, however, no authority in the act to charge interest on dues, interest on assessments, or interest on fines. Upon failure to pay any installment of interest on the loan,

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or installment of dues, or any assessment lawfully made, fines may be imposed; beyond this, the association had no right to go.

It appears, also, that the court refused to allow the appellant, Kenner, credit for professional services as the attorney of the association in prosecuting actions and recovering judgments for it on certain notes which contained an agreement for the payment of attorney's fees. The reason for such refusal was that the fees so provided for in the notes, in the opinion of the court, belonged to the attorney, and not to his client, and that the attorney must look to the judgment defendants for them. This view of the contract for the payment of such fees cannot be sustained. The fees when recovered belonged to the client. The client must pay his attorney whatever fees have been agreed upon between them, or in the absence of such agreement, such as are just and reasonable, and he is supposed to be reimbursed for this outlay by the repayment to him by the judgment defendant of the amount allowed for that purpose.

In the next place it is objected that the court excluded from the credits claimed by appellant any allowance for general services as the attorney and legal adviser of the association, and for office rent, fuel, lights, etc., furnished by him. This action of the court is defended by counsel for appellees on the ground that, as the appellant was the president and a director of the association, he could not lawfully receive compensation for such services, rent, etc. This view is not in accordance with the later authorities on this subject. When the claim of an officer of a corporation is for services rendered by him beyond the scope of his official duty, and no element of fraud or dishonesty is involved, it may be allowed and paid. While the courts will closely scrutinize such claims, they will not deprive an honest and meritorious creditor of moneys justly due to him, merely because he sustained an official relation to the corporation debtor when the services were performed, or the debt was contracted. The services

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for which compensation was claimed by appellant were not such as he was required to perform either as president or director. They were outside of his official duty, and he had a right to make a just and reasonable charge for them. 1 Beach on Priv. Corp., section 208.

For the reasons herein given, the motion for a new trial should have been sustained, and for the error of the court in overruling the motion, the judgment is reversed.

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GOSNELL v. JONES, ADMINISTRATOR.

[No. 18,599. Filed Mar. 29, 1899. Rehearing denied June 16, 1899.]

**MARRIAGE.—Extinguishment of Debts.—Husband and Wife.**—A husband cannot maintain an action against his wife's estate for an indebtedness created before their marriage. *p. 639.*

**HUSBAND AND WIFE.—Advancement to Wife.**—It will be presumed, in the absence of evidence, that payments made by the husband upon the debts of his wife were made as an advancement to her by virtue of her marital rights, and she is not bound to repay the same. *pp. 639, 640.*

**SAME.—Principal and Agent.—Recovery of Money Expended in Management of Wife's Estate.—Burden of Proof.**—In order to sustain a claim by a husband against his wife's estate for money used by him in payment of her debts and other expenses incident to the management of her estate, the burden rests upon the husband of proving that he used his own money. *p. 640.*

From the Montgomery Circuit Court. *Affirmed.*

*M. E. Clodfelter* and *H. N. Fine*, for appellant.

*Harney & Harney* and *Burton & Jones*, for appellee.

**MONKS, C. J.**—Appellant filed a claim against the estate of his deceased wife, of whose estate appellee was the administrator. The claim was for money paid out and advanced by appellant to pay her debts at her special instance and request, and for goods, wares, and merchandise sold and delivered to her. An allowance of \$4,000 was demanded. The cause was tried by a jury, and a verdict returned in favor of appellee, and over a motion for a new trial, judgment was

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rendered against appellant. The only error assigned calls in question the action of the court in overruling the motion for a new trial.

The only causes assigned for a new trial which are urged as grounds for reversal are, (1) The court erred in giving instructions one and two at the request of appellee, and in giving each of them; (2) the evidence is not sufficient to sustain the verdict.

It is stated in appellant's brief that it is shown by the evidence that Helen M. Stegner, a widow, and appellant were married Februray 5, 1895, and lived together as husband and wife until her death, which occurred July 29, 1896. Before her marriage to appellant, Mrs. Stegner, through appellant acting as her agent, purchased several tracts of real estate, and assumed certain mortgages thereon. From the time of the purchase of said real estate, appellant acted as her agent, looked after the making of improvements, the payment of the mortgages assumed by her, and other matters incident to the management thereof, and paid the persons for making said improvements, and also paid said mortgages and interest. The greater part of said payments were made before her marriage to appellant. It is evident, under the facts stated, that any and all indebtedness of Mrs. Stegner to appellant at the time of their marriage was discharged thereby, and that after said marriage he could not maintain an action therefor against her. Schouler Dom. Rel. section 73. This results from the rules of the common law, which, in this respect, have not been changed by statute. *Long v. Kinney*, 49 Ind. 235. See, also, *Henneger v. Lomas*, 145 Ind. 287, 289, 291, 32 L. R. A. 848, and authorities cited; *Barnett v. Harshbarger*, 105 Ind. 410.

The first instruction given at the request of appellee was in regard to the alleged indebtedness of his wife to him at the time of their marriage, and it is not necessary, therefore, to consider the same, even if erroneous, for the reason that it was harmless. As to the payments made by the appellant af-

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ter his marriage on the debts of his wife, the presumption is, even if he paid said debts with his own money, that he paid the same upon said indebtedness as an advancement to her in virtue of her marital rights, and she is not bound to repay the same. *Harrell v. Harrell*, 117 Ind. 94. It was held in the case last cited that the husband, if he lends money to his wife, or pays her debts under an express contract that she will repay the same, may recover therefor in a court of equity, if he shows that such contract is just and equitable. The burden of proof, however, in such a case rests upon the husband.

The second instruction given at the request of appellee was in harmony with these principles, and was not, therefore, erroneous. There is no evidence in this case of an express contract on the part of appellant with his wife, concerning the payment of her indebtedness, neither is the evidence sufficient to rebut the presumption that the money paid by appellant on the debts of his wife, even if his own money, was an advancement to her. Moreover, appellant acted as the agent of Mrs. Stegner, both before and after his marriage to her, in the purchase of real estate, and in the looking after and making improvements thereon, in the payment of mortgages thereon, and other matters incident to the management thereof. This agency commenced before his marriage, and continued until her death. The payments for which appellant seeks to recover were made during this period by him as her agent. Under such circumstances there is no presumption that such payments were made with his own money. The burden was upon him to show by the evidence that he made the payments with his own money, and this has not been done.

It follows from what we have said that there was no evidence to establish an essential element of appellants case, and that the court did not err, therefore, in overruling his motion for a new trial. Judgment affirmed.

## Hamilton v. Love.

## HAMILTON ET AL v. LOVE.

[No. 17,063. Filed Mar. 8, 1899. Rehearing denied June 27, 1899.]

**MASTER AND SERVANT.—Wrongful Discharge of Servant.—Complaint.**

—A complaint in an action by an employe for his wrongful discharge, alleging a violation of the contract of employment, the amount plaintiff would have earned under the contract, and demanding judgment therefor, sufficiently alleges the damages so as to make the complaint good on demurrer. *p. 642.*

**SAME.—Wrongful Discharge of Servant.—Complaint.**—In an action by an employe for his wrongful discharge the complaint need not show that plaintiff could not, with reasonable care and diligence, have obtained other equally profitable employment during the remainder of the life of the contract, since that is a matter of defense. *p. 643.*

**SAME.—Disobedience of Servant.—Discharge.**—The failure of an employe to observe his employer's rules for conducting business, of which rules the employe had no notice, is not sufficient reason for discharging an employe before the expiration of the time for which he was employed. *pp. 643, 644.*

**SAME.—Disobedience of Servant in Immaterial Matters.**—An employer has no right to discharge an employe before the expiration of the term of employment for trivial and unimportant acts of disobedience or negligence. *p. 644.*

**SAME.—Breach of Contract of Employment.—When Action May be Brought.**—An employe who has been wrongfully discharged may bring suit immediately upon the breach of the contract of employment and recover his full damages to the end of the term for which he was employed. *p. 645.*

**INSTRUCTIONS.—Must be Considered as a Whole.**—Where the instructions to the jury, taken as a whole, state the law correctly, the cause will not be reversed on appeal, though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge. *p. 646.*

**MASTER AND SERVANT.—Breach of Contract of Employment.—Pleadings.—Set-Off.**—In an action for breach of contract of employment, the fact that plaintiff earned wages after he was discharged by defendants, can be set up by way of partial answer, but cannot be pleaded as a set-off. *pp. 647, 648.*

**APPEAL AND ERROR.—Instructions.—Presumption.**—The presumptions on appeal indulged in favor of the action of the trial court

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extend as well to the giving of instructions as to any other of the proceedings. p. 649.

From the Vigo Superior Court. *Affirmed.*

*S. R. Hamill, S. C. Stimson, A. M. Higgins, H. A. Condit and R. B. Stimson*, for appellants.

*W. Mack, D. W. Henry, G. M. Crane, D. V. Miller and A. L. Miller*, for appellee.

DOWLING, J.—Action by appellee for damages for breach of executory contract for employment.

The alleged breach consisted in the wrongful discharge of appellee while the contract had one year and eight months to run, for which time he would have been entitled at the contract rate to \$3,600, payable in monthly installments. Verdict and judgment for appellee.

The overruling of the demurrer to the complaint, and the giving of certain instructions, are the errors complained of. The specific objections to the complaint are that "it does not allege damages," and that "it fails to show that appellee could not, with reasonable care and diligence, have obtained other equally profitable employment."

The complaint shows the contract, and a total breach by appellants by the wrongful discharge of appellee; it alleges the readiness and willingness of appellee to continue in such employment; it avers that by the contract appellee would have received \$150 per month for the eight months remaining of the second year, and \$200 per month for the third and last year; and it concludes with a prayer for damages for the violation of the contract by appellants, and a demand for judgment for \$3,600.

These facts were sufficient to constitute a cause of action. The remedy of a servant discharged without sufficient cause, before the expiration of the period of service stipulated for, is not in assumpsit as for implied services, or for wages, but is for damages for the breach of the contract. *Ricks v. Yates*, 5 Ind. 115; *Richardson v. Eagle Machine Works*, 78



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Ind. 422; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Hinchcliffe v. Koontz*, 121 Ind. 422; *Tiffin Glass Co. v. Stoehr*, 54 Ohio St. 157, 43 N. E. 279.

In such cases, the measure of damages is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably can by reasonable diligence be earned during the time covered by the breach. *Hinchcliffe v. Koontz*, *supra*; *Richardson v. Eagle Machine Works*, 78 Ind. 422; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *James v. Allen Co.*, 44 Ohio St. 226, 58 Am. R. 821, 6 N. E. 246; *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. 273, 27 Atl. 501; *Costigan v. Mohawk, etc., R. Co.*, 2 Denio, (N. Y.) 609; *King v. Steiren*, 44 Pa. St. 99.

The allegations of the complaint, touching the loss appellee sustained by the breach, are equivalent to a direct averment that he had been damaged to the amount charged. The sufficiency of the averment is to be tested by the rule as to damages under such circumstances, and nothing more need be shown on this subject than the loss of the compensation agreed upon for the unexpired term.

The second objection to the complaint is equally untenable. It is not necessary that the discharged servant should allege in his complaint that since his discharge he has been unable to obtain employment, and has earned nothing. If he has, or by the exercise of reasonable diligence could have obtained employment, or earned wages after his discharge, these facts are matters of defense, and must be established by the master. *Dunn v. Johnson*, 33 Ind. 54; *Gazette, etc., Co. v. Morss*, 60 Ind. 153; *Cincinnati, etc., R. Co. v. Lutes*, 112 Ind. 276; *Hinchcliffe v. Koontz*, 121 Ind. 422; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630; *East Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.) 397.

At the trial, the court gave certain instructions, and modified others, and of this action the appellants complain. One of the instructions given, after modification, was this: "If

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you believe from the evidence that the plaintiff, within the scope of his alleged employment as solicitor of life insurance, refused to obey or submit to the directions or rules of the defendants, *having notice of such directions or rules*, or that he so behaved himself as to make it difficult or disagreeable for them to direct and control him in the performance of his alleged duties, the defendants had a right to discharge him from their service, and he cannot recover damages therefor."

The modification complained of consisted in adding the words we have italicized. In this we find no error. If appellants had rules or regulations for conducting their business, and which the servant was required to observe, it was their duty to make them known to him. If the servant had no notice of such rules and regulations, he could not be expected to conform his conduct to them.

Another instruction given as modified was as follows: "By the terms of the contract set out in the complaint, the plaintiff sold his services to the defendants for a stipulated time, and for a stipulated price. During the time stipulated in the contract, the defendants not only had the right to such services, but they had a right to direct and control the plaintiff in the performance of such services; and if the plaintiff refused to submit to such directions and control, *in material matters*, the defendants had a right to discharge him, and such discharge would not be a breach of the contract, and the plaintiff would not be entitled to recover damages therefor."

The qualification of this instruction by the addition of the words, "in material matters," was proper. The master would have had no right to discharge the servant for trivial and unimportant acts of disobedience or negligence. Schouler Dom. Rel. section 462. Whether there had been such disobedience was a question for the jury.

For the same reasons, it is our opinion that the trial court did not err in charging, that, if it was found from the evidence that the appellee had made slight losses of time, and

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had been disobedient in immaterial matters, after which he had been continued in the service for a considerable period without complaint from appellants, such conduct would not justify discharging him after such continued service. The contract was general in stating the time of service at three years, and was subject to such reasonable construction as to the hours of service, as the extent, character, and rules of the business of appellants should warrant. Both parties having acted upon a construction of it, and acquiesced in such construction for a considerable time, the master could not make a stale violation of the letter of the contract a pretext for discharging the servant.

Finally, it is complained that the court gave, at the appellee's request, the following instruction: "If plaintiff was wrongfully discharged twenty months before his contract expired, he had a right to sue at once for a breach of the contract, which he has done, and he would have a right to recover his full damages to the end of his term."

While there is much conflict among the authorities as to the measure of damages upon the wrongful discharge of a servant, the decisions in this State have been consistent and uniform upon this subject. There can be but a single action, and not successive actions. The action must be for damages for the breach of the contract, and not in assumpsit for constructive services, or for wages. All damages sustained by the servant, in consequence of the wrongful act of the master, whether present or prospective, must be included in the recovery. A single judgment for the injury bars all other claims. The suit may be brought at any time after the breach, either before the expiration of the term of the contract, or afterwards, within the statutory limit. But whether brought before or after the expiration of the term of the contract, the measure of the damages is the same. If brought during the term, the difficulty in ascertaining the amount of the damages sustained may be greater than if the action had been deferred until the term of the contract had expired.

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But the difficulty and uncertainty in such cases are not greater than in many others, where a permanent and continuing injury is alleged, and the plaintiff is confined to a single action for his damages. *Schell v. Plumb*, 55 N. Y. 592; *Remelee v. Hall*, 31 Vt. 582, 8 Am. & Eng. Enc. of Law (2nd. ed.) p. 651; *Wakeman v. Wheeler, etc., Co.*, 101 N. Y. 205, 54 Am. R. 676, 4 N. E. 264.

The instruction under review was given in connection with others which explained and limited the general rule contained in the foregoing, and among these were the following:

"11. If you find from the evidence that the plaintiff can, with a reasonable effort, find employment, in the line of his business, the value of the unexpired time, under the contract sued on, or the sum he might earn by reasonable diligence, from this time until the expiration of the contract sued on, should be deducted from the amount he might otherwise be entitled to recover, if he is entitled to recover anything."

"18. If you find defendant [plaintiff] performed his part of the contract for sixteen months, and was wrongfully discharged by defendants, he has a right to recover in this action whatever amount he has been damaged thereby. Under his agreement, he was to have at the rate of \$1,800 per year for the eight months of this year, and \$2,000 for next year. From this amount, defendants may show what he has earned since his discharge, and what he may reasonably earn during the balance of the time for which he was employed; and whatever is shown you must deduct from the contract salary; and you will also deduct interest on the salary from this time to the end of the term, i. e., you will rebate the interest on such sums as are to become due and give him a verdict for the balance."

All of the instructions given in a cause are to be construed with reference to each other, and the entire charge is to be taken as a whole, and not in detached parts. If it is consistent with itself, and, taken together, states the law correctly, it is not subject to objection, even if the whole of the law

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upon a particular head is not fully stated in one or more of the separate parts of such charge.

We think the instruction complained of states the law correctly, and that it is sustained by the authorities hereinbefore cited. If it required elucidation or qualification, the other instructions given by the court were amply sufficient to enable the jury to make a proper application of the rule; and the amount of the verdict returned furnishes no indication that they misunderstood the law, or fell into error in applying it.

We have carefully examined all the cases and text books, referred to by counsel for appellant, but found nothing in them which inclines us to change our views of this case. We do not approve the doctrine stated in *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. 511, and *Gordon v. Brewster*, 7 Wis. 309, and decline to follow these cases.

Finding no error in the record, the judgment is affirmed.

#### ON PETITION FOR REHEARING.

DOWLING, J.—In their petition for a rehearing, appellants complain that the court failed to consider the errors assigned upon the rulings on the demurrers to the *second* and *fourth* paragraphs of the answer.

The only reference made in the briefs of counsel for appellants to this branch of their case is the following: "The *second* paragraph of the answer is good, for the reason that the master owns, and is entitled to receive, all the earnings of the servant in the business in which he is employed. And, therefore, such earnings are a proper set-off to a demand for wages. The *fourth* paragraph is good, for the reason that it shows, specially, the non-performance of the contract by appellee."

The evident insufficiency of the *second* paragraph of the answer, and the fact that the *fourth* was merely a special denial, taken in connection with the failure of counsel to dis-

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cuss either of them, created the impression that the errors assigned, upon these rulings, were not seriously insisted upon.

The second paragraph of the answer is bad. The action of the appellee was not for wages, but for damages for a breach of contract. His earnings belonged to him, and appellants had no claim upon them. The fact that appellee did earn wages after he was discharged by appellants might have been set up by way of partial answer to reduce the amount of appellee's recovery, but it could not be pleaded as a set-off.

Neither was this paragraph good as a partial answer, for the reason that it did not confess and avoid the complaint, or any part of it. The averments were that the appellants "fully complied with all of the conditions of said contract on their part to be performed, but that the plaintiff refused and failed to comply with said contract." It then alleges that, while so acting and being otherwise engaged than in the service of appellants, the appellee earned and received for his own use \$600. If these allegations were true, appellants had a claim for damages for the breach of the contract, and appellee had no cause of action whatever against them. In such case, the measure of damages would not be what appellee had earned, but what appellants had lost.

The fourth paragraph of the answer, as we have stated, was a special denial. It was pleaded in connection with the general denial. The ruling on the demurrer to it was harmless, as all facts admissible under it could have been given in evidence under the general denial. It might, properly, have been stricken out on motion.

It is insisted that the trial court erred in giving instructions numbered five and nine, and that this error should reverse the judgment. These instructions were as follows:

"There is nothing in this contract that requires Love to work every day and hour for three years. It is to have a reasonable construction, and the fact that he had leave for two or three days to look after his private affairs, and did so, or that he went for a half-day to a fair, and a like time to the

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racess, without their permission, but with their subsequent knowledge, and no objection or protest was ever made to him, nor any complaint, or claim against him, and he continued in their employment for months afterward, such failures would not be ground for discharging him at the time when he was discharged."

"Although the law requires an agent to obey all reasonable directions and orders of his employers, and the directions in which he failed, or refused to obey, were in unimportant matters, and no objections were ever made to him for such failures, and he continued in his employment, his failures or refusals would not be sufficient ground for discharge long after they occurred."

The objection made to these instructions is that the court assumed the existence of certain facts, and in so doing invaded the province of the jury.

Upon an appeal, every reasonable presumption is indulged in favor of the action of the trial court. These presumptions extend as well to the giving of instructions as to any other of the proceedings. If, under any circumstances, the instruction would be correct, we are bound to presume that such a state of facts existed as warranted the court in giving the instructions. If such circumstances did not exist, the burden is upon the party complaining to overcome the presumptions of correctness. Elliott's App. Proc., sections 709, 722; *Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386, 9 S. E. 1076; *Hinds v. Harbou*, 58 Ind. 121.

In the briefs filed on behalf of appellant, there is not a word in regard to the state of the evidence as to the facts so alleged to have been assumed by the court. Conceding without deciding, that the court did assume the existence of the facts that appellee had leave for two or three days to look after his own affairs, and that he did so; that he went for half a day to a fair, and for a like time to the races, without permission; that appellants subsequently had knowledge of these facts; that they made no objection or protest to him;

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that no complaint or claim was made on this account; and that appellee thereafter continued in the employment of appellants for some months,—in the absence of any evidence to the contrary brought to our notice by appellants, we have the right to presume either that these facts were admitted on the trial, or that they were proved by the appellee, and not controverted by the appellants.

We have not thought fit, however, to rest upon this presumption. Without any assistance from the briefs in the case, we have carefully searched every line of the 197 pages of the record and found that the evidence stood as follows: The plaintiff, Love, testified to the following facts:

"I put in all of the time, with the exception of three or four days that I gave an account of, an agreement before I took those days off." Record, page 80, lines 19-21.

"I was there" (at the fair) one-half day. Did not make any direct report of it. I told those about the office, when I came to the office, that I had been to the fair." Record, page 92, lines 11-16.

"I do not think I said anything about it," (the races). "I was at the races one-half day. I saw and recognized one or two of the firm there." Record, page 94, lines 21-26.

"I reported to the firm that I had spent a day or two at my own business." Record, page 95, lines 5-10.

"The fair was a good place to go to to form acquaintances, or to touch up your old acquaintances whether they are contemplating anything of the kind. (Life insurance.) "I talked to two or three." Record, page 100, lines 7-11.

The whole of the evidence, as to these facts, given on behalf of the appellants, was the following: J. Irving Riddle, one of the appellants, testified: "I didn't tell him (Love) anything about the rule of the office." Record, page 128, lines 2-3. And William A. Hamilton, the other appellant, thus testified: "Don't remember any complaint about his not coming at 8 o'clock and 1 o'clock." Record, page 174,



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lines 21-22. "Do not know that we made any specific complaints." Record, page 183.

Nowhere in the evidence are the foregoing statements of the appellee denied. The facts referred to by the court in the instructions were established by the uncontradicted testimony of the appellee, and the presumption of the correctness of the instructions is confirmed by an examination of the record.

The other points made in the petition for a rehearing were, as we think, correctly and fully decided in the original opinion.

The petition for a rehearing is overruled.

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HAY v. MARSH ET AL.

[No. 18,529. Filed Nov. 29, 1898. Rehearing denied June 28, 1899.]

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**FRAUDULENT CONVEYANCE.—Evidence.—Sufficiency.**—In an action to set aside a conveyance as fraudulent grantor testified that he had received from the grantee several items of cash and personal property; that these had not supplied the consideration for the conveyance, but that he had assigned a certain judgment in payment or as security therefor; that grantee gave nothing for the deed; that he told grantee of his indebtedness to plaintiffs, and grantee "said he would do them up." *Held*, that the evidence was sufficient to set aside the conveyance as fraudulent against creditors. *pp.* 651, 652.

**EVIDENCE.—Review.—Special Finding.**—Where there is evidence which, if standing alone, supports the finding of the trial court, it is the duty of the Supreme Court to accept such evidence and disregard all evidence in conflict therewith. *p.* 652.

From the Clark Circuit Court. *Affirmed.*

*H. A. Burt, J. E. Taggart, H. M. Dowling and Elliott & Elliott*, for appellant.

*W. H. Watson, J. W. Fortune and L. A. Douglass* for appellees.

**HACKNEY, J.**—The question in this case is as to the validity, as against creditors, of a conveyance by one McDanel to the appellant. The only contention on behalf of the appellant is that the evidence, showing a conveyance for an

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adequate consideration, did not establish a fraudulent design on the part of Hay, the grantee.

The grantor testified that he had received from Hay several items of cash and personal property; that these had not supplied the consideration for the conveyance but that he had assigned to Hay a certain judgment in payment or as security therefor; that "Hay gave \* \* \* nothing for the deed;" that he told Hay of his indebtedness to the appellees, but Hay "said he would do them up",—meaning that he would beat them out of their claim.

There was evidence in conflict with this, but we are not permitted to weigh and determine conflicts in evidence. When there is evidence which, if standing alone, supports a finding of the trial court, it is our duty to accept such evidence, and to disregard all evidence in conflict therewith. The evidence to which we have referred very clearly authorized the finding of fraud on the part of the appellant, it having been further shown that the debtor possessed no other property at the time of the conveyance or since. The judgment is affirmed.

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THE STATE v. HOGREIVER.

[No. 18,783. Filed May 23, 1899. Rehearing denied June 28, 1899.]

CRIMINAL LAW.—*Affidavit*.—*Baseball*.—*Sunday*.—An affidavit in a prosecution for playing baseball on Sunday where an admittance fee is charged, in violation of section 2087 Burns 1894, is not bad for failing to state the name of some person who paid an admission fee pp. 653 656.

SAME.—*Baseball*.—*Sunday*.—Section 2087 Burns 1894, prohibiting any person from playing baseball on Sunday "where any fee is charged" is not void for uncertainty as to the meaning of the word "fee", or by whom it is to be paid. pp. 656, 657.

STATUTORY CONSTRUCTION.—*Constitutional Law*.—The rule that a penal statute will be strictly construed does not apply in determining the constitutionality thereof. p. 657.

CONSTITUTIONAL LAW.—*Baseball*.—*Sunday*.—Section 2087 Burns 1894 prohibiting any person from playing baseball on Sunday, where a fee is charged, is not class legislation within the mean-

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ing, and in violation of the fourteenth amendment of the United States Constitution providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens, nor deny to any person, within its jurisdiction the equal protection of the laws", nor of article 1, section 23 of the State Constitution providing that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." pp. 657-659.

CRIMINAL LAW.—*Police Power.—Baseball.—Sunday.*—Section 2087 Burns 1894 prohibiting persons from playing baseball on Sunday where a fee is charged is a valid exercise of the police power of the State. pp. 659, 660.

SAME.—*Penalties.—Constitutional Law.*—Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. pp. 661, 662.

SAME.—*Penalties.—Review.*—The graduation of penalties for offenses, differing in their circumstances and surroundings is a matter wholly within the discretion of the legislature, and will not be reviewed by the courts where an abuse of discretion is not shown. pp. 661, 662.

From the Marion Criminal Court. *Reversed.*

W. L. Taylor, Attorney-General, *Merrill Moores, C. C. Hadley* and *C. S. Wiltsie*, for State.

*F. B. Burke* and *Henry Warrum*, for appellee.

DOWLING, J.—The appellee with three other persons was charged upon affidavit in the police court of the city of Indianapolis with a violation of the statute prohibiting the playing of baseball on Sunday, where any fee is charged. He was found guilty, and fined. He appealed to the Marion Criminal Court, and, on motion, the affidavit was quashed, and he was discharged.

The State appealed, and the error assigned is the ruling of the court on the motion to quash.

The affidavit thus brought under review is in these words: "State of Indiana, Marion County, City of Indianapolis, —ss: Be it remembered that on this day before the judge of the police court of the city of Indianapolis, per-

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sonally came Chris Kruger, who, being duly sworn upon his oath, says: That Albert H. Pardee, George Hogreiver, Ed. H. Deady, Jess Hoffmeister, late of said city and county, on the 22nd day of May, in the year 1898, at and in the city of Indianapolis, county aforesaid, did then and there unlawfully engage in playing a game of baseball, where an admittance fee of twenty-five cents each was charged, and paid by the spectators then and there being, the said day being the first day of the week, commonly called Sunday, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.

[Signed]

CHRIS KRUGER.

"Subscribed and sworn to before me this 23rd day of May, 1898. Charles E. Fox, Judge."

The affidavit is assailed upon the grounds (1) that it does not state facts sufficient to constitute a public offense; (2) that the act of the legislature upon which it is based is unconstitutional; and (3) that the said act is ambiguous and uncertain, and therefore void.

The statute so assailed is in these words: "It shall be unlawful for any person or persons to engage in playing any game of baseball where any fee is charged, or where any reward, or prize, or profit, or article of value is depending upon the result of such game, on the first day of the week, commonly called Sunday, and every person so offending shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding twenty-five dollars." Acts 1885, p. 127, section 2087 Burns 1894.

Among the objections taken to the sufficiency of the affidavit, it is urged that if the word "fee," in the statute means a charge for admission, then the name of some person paying it should be stated, and in support of this objection we are referred to Vol. 10, Enc. Pl. and Pr. pp. 505, 506; Harris' *Crim. Law*, pp. 265, 266; *State v. Stucky*, 2 Blackf. 289; *State v. Jackson*, 4 Blackf. 49; *State v. Noland*, 29 Ind.

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212; *Zook v. State*, 47 Ind. 463; *Alexander v. State*, 48 Ind. 394; and *McLaughlin v. State*, 45 Ind. 338.

But the rule as laid down in these authorities goes only to the extent that when the names of third parties enter into the offense, and are necessary for the description of the crime charged, and for its identification, they must be set out. In the case of the *State v. Stucky*, *supra*, the indictment charged a sale of liquor "to divers persons," without license. Held, that the names of the persons should be stated, if known. In *State v. Jackson*, *supra*, the charge of selling liquor to an Indian of the Miami tribe, whose name was unknown, was held good. *State v. Noland*, *supra*, was an indictment for suffering a house to be used for gaming. Held, that the names of the persons who were suffered to gamble should be set out, if known. *Zook v. State*, *supra*, and *Alexander v. State*, *supra*, were prosecutions against owners of billiard tables for permitting minors to play billiards. Held, that the names of the minors, and of the persons with whom they played, should be stated, or the reason given for not doing so. *McLaughlin v. State*, *supra*, was an indictment for selling liquor to persons intoxicated, etc. Held, that the names of the persons to whom sales were made should be set out, if known.

It will be observed that none of these offenses bears the least resemblance to the misdemeanor before the court, in its character, circumstances, or legal description, and the rule which governs those cases does not apply to the offense set forth in this record.

The object and meaning of the statute under examination are plain. The intention of the people of the State was by this law to prohibit the playing of baseball on Sunday where a fee was charged. "Where" signifies, "a place at which," or, "under circumstances in which." Standard Dictionary; Webster's International Dictionary.

The law applies to exhibitions in which the actors or players engage in the game of baseball.

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It discriminates between *free* exhibitions of this kind, and those where a fee must be paid by the persons witnessing the performance.

It knows but two parties to such an exhibition,—the *players* and the *spectators*. It does not in the least concern itself with managers, owners of baseball teams, lessors or lessees of the grounds where the game is played, or the proprietors of adjoining lands or buildings. It is immaterial to whom the fee is paid, whether directly to the players, to their agent or manager, or to some person or company hiring, or otherwise securing the services of the players.

The natural meaning and obvious signification of the word “*fee*,” in its connection in this statute is, the sum charged each person admitted to witness the game of baseball by the persons giving the exhibition.

It is not necessary to set out the name of any person paying such fee for admittance. It is enough to aver that a fee for admittance was charged. This indicates that the exhibition was not free, but was given for the purpose of gain, and in that respect it sufficiently describes the offense. *Hull v. State*, 120 Ind. 153.

On the trial, it would not be necessary to prove that any particular person paid a fee for admittance. It would be sufficient to show that the exhibition was not free, but that persons desiring to witness it were required to pay a fee, or buy a ticket to secure that privilege. Evidence that one or more persons did pay fees for admittance would, of course, be competent proof that it was not a free entertainment, but one where a fee was exacted from the spectators.

This construction of the statute does not extend its scope beyond the fair and natural import of its terms.

We are next asked to hold the statute void for uncertainty and ambiguity, and the supposed defect consists in the use of the words, “where any fee is charged.” It is said that this part of the act is indefinite and uncertain, and that it cannot be understood what is meant by “*fee*,” or by whom it is to

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be paid. What we have said in regard to the affidavit, is a sufficient answer to this objection. There are but two kinds of exhibitions, one free, where the spectator is admitted without charge; the other restricted, where the spectator is charged a fee for admittance. Two classes of persons, only, are recognized by the statute as concerned in such exhibition, the players, and the persons assembled to witness the game. Keeping these facts in view, there is not the slightest difficulty in determining what is meant by the term *fee*, or by whom, and to whom it is to be paid.

The constitutionality of the statute is attacked and in connection with this assault it is contended that, the act being penal, it is to be strictly construed.

We recognize the importance of the rule as to the construction of penal statutes in all cases to which it properly applies, but we do not believe it should be so unreasonably enforced as to defeat the sovereign will when that will is expressed, as it is here, with ordinary certainty, and is easily intelligible. A law established by the legislature is entitled to the respect of every branch of the state government. It should never be lightly overthrown, or set aside, as unconstitutional. A statute enacted with the constitutional formalities comes before this court, sustained and authenticated by the sanction and approval of two of the three great departments of the state government. The power to set aside and declare void an enactment so sanctioned and approved, is the highest exertion of the constitutional authority of this court, a prerogative always exercised with reluctance, and never asserted where the question of the constitutionality of a statute is in doubt.

Counsel for appellee insist that the act prohibiting the playing of baseball on Sunday, where a fee is charged, and subjecting the players to a fine, is in conflict with those clauses of the federal and state Constitutions which forbid class legislation.

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The fourteenth amendment of the Constitution of the United States provides that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens, nor deny to any person, within its jurisdiction, the equal protection of the laws."

The Constitution of the State of Indiana contains this clause (article 1, section 23): "The General Assembly, shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

Does a statute which prohibits the playing of games of baseball on Sunday, where a fee is charged, abridge the privileges or immunities of citizens of the United States or deny to any person within the jurisdiction of the State, the equal protection of its laws? Does it grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, do not equally belong to all citizens?

The argument of counsel for appellee is that baseball playing is an occupation by which persons skilled in the game earn a livelihood; that the persons engaged in this particular calling cannot be singled out, and prohibited from exercising it on Sunday, under different and more severe penalties than those imposed on citizens engaged in other kinds of business; and that, as the statute before us makes this discrimination, it violates the organic law.

Whether or not the game or sport is entitled to recognition as a form of labor, and therefore stands on the same footing as blacksmithing, farming, or selling merchandise, is not material. The State deals with it in the exercise of its police power, to circumscribe certain evils which are likely to result from its unrestrained practice, to repress certain known pernicious tendencies, and to protect the citizens of the State in the enjoyment of that repose and quiet on the day set apart by secular laws for rest and recuperation to which they are entitled.

The objects of the game of baseball, as stated in the brief



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of counsel for appellee, are to furnish entertainment and amusement to the spectators of the sport. It is said to be popular. It attracts great throngs, including persons of all ages and of both sexes. Both chance and skill enter into the doubtful results of the game. It affords the opportunity, and furnishes strong inducements to that species of gambling known as "betting." The contests between the players are often close and exciting, and the decisions of umpires unsatisfactory. Tumults, riots, and breaches of the peace at the games, are not uncommon.

Wherever these conditions exist, the peace and quiet of neighborhoods are liable to be disturbed, and the public order broken. Under such circumstances, it follows that extraordinary police regulation and supervision become necessary, and, this being the case, these exhibitions fall, unquestionably, within the class of entertainments and occupations which, in the legitimate exercise of the police power of the State, may be regulated, restrained, or even prohibited by the people, through the legislature, without a violation of any provision of the Constitution, state or federal.

Familiar instances of the exercise of this power are found in the laws and in municipal ordinances relating to the selling of liquor, the maintenance of dance houses, and concert saloons, theaters, circus performances, horse racing, the keeping of places for sports and games, billiard rooms, the ringing of bells, regulating the speed of horses on streets and highways, regulating sales in markets, relating to persons having infectious diseases, regulating the business of mining and many others.

The statute of this State known as the "General Sunday Act" has a wider scope than is sometimes ascribed to it. It prohibits not only acts of common labor, but it forbids rioting, hunting, fishing, and quarreling on the first day of the week, commonly called Sunday. It applies to amusements and recreations, as well as to labor, and conduct tending to a breach of the peace. Section 2086 Burns 1894. Its consti-

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tutionality has repeatedly been assailed by litigants, and as often affirmed by the decisions of this court.

In *Voglesong v. State*, 9 Ind. 112, (1857), it is said: "The constitutionality of the Sunday act we shall not discuss; though the counsel, in this case, have presented a very learned and able printed argument against its validity. The question can hardly be considered as an open one. The grounds upon which such acts are sustained have been thoroughly examined and are generally admitted to be substantial. This court has acted upon them as such."

Again in *Foltz v. State*, 33 Ind. 215, (1870), the court say: "It is urged that the law, under which the prosecution was had, is obnoxious to the Constitution of the State.

"We decline the discussion of this question, for the reason that the act in question has been so long recognized and acted upon, and so often affirmed by this court, that it cannot longer be regarded as an open question in this State."

The question of the validity of the Sunday act was again before the court in *Johns v. State*, 78 Ind. 332, 41 Am. R. 577, (1881), and was disposed of in these words: "The second question is this: Is the 95th section of the act of April 14, 1881, in conflict with any constitutional provision? A long line of decisions affirm the validity of this law. It has been sustained against repeated assaults. It has been a part of the statutory law of the State since its organization. Cases old and new have sustained and enforced it. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, and authorities cited; *Mueller v. State*, 76 Ind. 310. Like statutes have been upheld in almost all of the states of the Union."

The cases in which the constitutionality of similar statutes have been sustained are practically innumerable. A few of the more important are the following: *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511; *Health Department v. Trinity Church*, 145 N. Y. 32, 39 N. E. 833. 27 L. R. A. 710; *State v. Powell*, (Ohio) 50 N. E. 900;

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*State v. Judge*, 39 La. Ann. 132, 1 South. 417; *People v. Bellet*, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 296.

These decisions, and many others which might be named, indicate the general sentiment and the fixed public policy in the states of the Union on the subject of Sunday legislation. That sentiment is too widely spread and profound, and that policy too firmly embedded in the laws, and in the decisions of the courts to be changed or overthrown.

But it is said, that under the general statute making hunting, fishing, rioting, quarreling, and engaging in acts of common labor unlawful, the person offending is subject only to a fine of not more than \$10, while the baseball player, under the act of 1885, for practically the same offense, may be subjected to a penalty of \$25. Hence, it is claimed, the effect of this act, if upheld, is to grant to other citizens privileges and immunities, which, upon the same terms, shall not equally belong to all citizens.

The constitutional authority of the legislature to enact any statute making it unlawful to do certain acts on the first day of the week, commonly called Sunday, being admitted, violations of such laws are not privileges and immunities which must be secured to all citizens alike, and upon the same terms. Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. It is but reasonable that in every case of the violation of law the penalty should be graduated by the character and circumstances of the offense, and in proportion to its injurious consequences to the public.

This principle has been recognized and adopted in this State from the earliest period of its government. Special penalties for selling liquor on Sunday have been enforced. Thirteen separate species of embezzlement are mentioned in the criminal code, and seven distinct kinds of punishment are provided for the crime, ranging from imprisonment for six

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months to confinement for twenty-one years. Many other instances may be found in the statutes. The state officer, who is found guilty of the crime of embezzlement, may be imprisoned twenty-one years, and fined double the value of the money embezzled. A tenant who embezzles the crops of his landlord can be imprisoned only three years. Could the state officer overthrow the statute which denounces his crime as class legislation, because the penalty for another species of embezzlement is imprisonment for three years only? Natural justice requires that the penalty shall bear some proportion to the nature and circumstances of the offense. The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts. If the legislature deemed it expedient for the public welfare that a baseball player, who gave a public exhibition of his skill on Sunday, where a fee was charged, in the presence of numerous spectators, should be fined \$25 for the offense, but that a citizen who shot a partridge, caught a fish, shod a horse, or sold a yard of cloth would be sufficiently punished by a fine of \$10, shall the courts go to the absurd length of saying that this was class legislation, and that the Constitution had been violated?

The act in question applies equally to all that class of persons who play baseball on the first day of the week, commonly called Sunday, where a fee is charged for such exhibition. It neither directly nor indirectly grants privileges or immunities to one citizen, or class of citizens, or denies them to another. The graduation of penalties for offenses differing in their circumstances and surroundings is a matter wholly within the competence and discretion of the legislature, and in this case we discover no abuse of that discretion.

As a result of these views, we are of the opinion that the affidavit in this case was sufficient in form and substance; that the act approved April 4, 1885 (Acts 1885, p. 127), sec-

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tion 2087 Burns 1894, is constitutional; and that it is not void for uncertainty.

The judgment is reversed, with instructions to overrule the motion to quash the affidavit, and for further proceedings in accordance with this opinion.

## ILLINOIS CENTRAL RAILROAD COMPANY v. CHEEK.

[No. 18,350. Filed April 27, 1899. Rehearing denied July 7, 1899.]

**COMPLAINT.—Personal Injuries.—Description of Injuries.—Motion to Make More Specific.**—A complaint against a railroad company for damages, alleging that plaintiff, while attempting to enter a passenger car, sustained severe and permanent injuries, described as the displacement of the right ovary, and the rupture of the organs of the "pelvic and ileocolic and right inguinal region, and the straining of the right fallopian tube, and a disarrangement of the uterus," etc., is not so vague and uncertain in the description of the injuries sustained as to be subject to a motion to make more specific. *pp.* 665-667.

**APPEAL AND ERROR.—Assignment of Error.**—Where appellant assigned the action of the court in overruling separate demurrers to two paragraphs of complaint, "that the court erred in overruling appellant's demurrer to appellee's complaint," the complaint will be considered as assailed as an entirety, and both paragraphs must be shown to be insufficient to render the assignment available. *p.* 667.

**PRACTICE.—Harmless Error.—Special Verdict.—Appeal and Error.**—Where the special verdict followed the material facts as averred in the second paragraph of complaint, an erroneous ruling on a demurrer to the first paragraph will not constitute reversible error on appeal. *pp.* 667, 668.

**CONTRIBUTORY NEGLIGENCE.—Damages.—Railroads.—Complaint.**—A complaint against a railroad company for damages on account of injuries sustained by plaintiff in attempting to enter defendant's passenger car, alleged that defendant neglected to construct a platform at its station where plaintiff took passage; that defendant stopped its train at a place where the distance from the ground to the lowest step on the car was three feet, and invited the plaintiff to board the car in such position without furnishing a stool to assist her in reaching the steps; that plaintiff requested that a stool be furnished for such purpose, but the servants in charge of the train assured her that they would assist her to board the train in safety, and in making an effort to enter the car without any fault or negligence on her part she was injured. *Held*, that the com-

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163	457

152	663
164	456

152	663
164	456

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166	296
168	279

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plaint does not show, as a matter of law, that plaintiff was guilty of contributory negligence. *pp. 668-671.*

**INTERROGATORIES TO JURY.**—*When Properly Rejected.*—Interrogatories which do not call for findings of essential facts within the issues are properly rejected. *p. 672.*

**SAME.**—*When Properly Rejected.*—*Special Verdict.*—Where a special verdict is so framed, by means of interrogatories, that the jury can find, under the evidence, all of the material facts of the case, neither party can successfully complain of the action of the court in rejecting interrogatories submitted. *p. 673.*

**SAME.**—*Conclusions of Law.*—*Special Verdict.*—Incorporating in a special verdict interrogatories requiring the jury to state conclusions of law instead of facts is harmless. *p. 673.*

**SPECIAL VERDICT.**—*Omission of Formal Conclusion.*—Where the facts in a special verdict are properly stated the omission of the formal conclusion will not vitiate it. *pp. 673, 674.*

**APPEAL AND ERROR.**—*Record.*—*Instructions.*—Instructions which are not made part of the record by bill of exceptions, nor under the provisions of section 544 Burns 1894, are not subject to review on appeal. *p. 674.*

**CONTRIBUTORY NEGLIGENCE.**—*Special Verdict.*—*Conclusion.*—Where the facts disclosed by a special verdict are such as would warrant reasonable men in drawing two inferences as to the contributory negligence of plaintiff, and the jury found the ultimate fact of contributory negligence in favor of the plaintiff, such inference will be accepted by the court as conclusive. *pp. 674-677.*

**APPEAL AND ERROR.**—*Excessive Damages.*—Where appellant challenged the damages assessed by an assignment in a motion for a new trial that the damages were excessive, the Supreme Court will look to the evidence, and not to the special verdict to determine such question. *pp. 677, 678.*

**SAME.**—*Excessive Damages.*—The mere fact that damages assessed may appear to the Supreme Court to be excessive will not alone justify it in disturbing the judgment, unless the assessment is so large as to induce the belief that the jury was actuated by prejudice, partiality, or corruption. *p. 678.*

**SAME.**—*Record.*—*Misconduct of Jury.*—Alleged misconduct of the jury cannot be reviewed on appeal where the affidavits filed upon the trial of that issue have not been brought into the record by a bill of exceptions. *p. 679.*

**SAME.**—*Exclusion of Evidence.*—*Exceptions.*—*How Saved.*—In order to present any question on appeal as to the action of the court in excluding evidence, the record must clearly show that the witness was asked a pertinent question, and, upon objections being interposed, that a statement was made by the party offering the evidence

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of what was proposed to be proved by the witness in answer to the question. *pp.* 679, 680.

From the Warren Circuit Court. *Affirmed.*

*W. L. Rabourn, J. E. Williamson and L. J. Hackney,*  
for appellant.

*J. Frank Hanley, W. R. Wood, H. D. Billings, E. F. McCabe and R. Braden,* for appellee.

JORDAN, J.—This action was instituted by the appellee to recover damages for the alleged negligence of appellant resulting in an injury to her on attempting to enter a passenger car on the railroad of appellant at a station at the town of Ullin, in the state of Illinois. There was a special verdict returned by the jury formulated by means of interrogatories submitted by the court under the provisions of the act of 1895, and the jury therein assessed appellee's damages in the event she was entitled to recover upon the facts found, at \$14,000. Over appellant's motion for a new trial the court rendered judgment on the special verdict in favor of appellee for the damages assessed.

The complaint is in two paragraphs. The second paragraph, after alleging facts disclosing that the defendant is a duly organized corporation, engaged in the business of a common carrier, operating a railroad through the town of Ullin, in the state of Illinois, which line also extends into Warren county, Indiana, proceeds, *inter alia*, to allege substantially the following facts: The plaintiff on January 13, 1895, was the holder of a ticket which entitled her to be carried as a passenger on the defendant's cars. On said day she was at the station of the defendant's railroad, at said town of Ullin, for the purpose of taking passage over defendant's road. The defendant had negligently failed to erect and maintain at said station a platform, and on the arrival of its passenger train on that day at the station in question the train was stopped by the servants in charge thereof at a point on the track where there was no platform, and where

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the distance between the ground and the lowest of the steps leading to the platform of the car was three feet. It was the custom and general habit of the defendant when it stopped its trains at said station, before inviting passengers to board such trains to procure a stool or step for their use in boarding the train. After the train had stopped at the point aforesaid on the occasion in question, the defendant by its servants invited plaintiff and other passengers to board said train. The plaintiff, on approaching the train, and observing the distance between the ground and the car step, requested defendant's servants in charge of the train to procure a step or stool to assist her in reaching the car step. Said servants negligently failed and refused to procure such step or stool, but assured plaintiff that they could and would assist her safely to board the train as it then stood without the use of such step or stool. Plaintiff believed and relied upon the statements and representations of defendant's servants so made and, depending upon them for assistance, attempted to and did, board said train. The servants of the defendant, however, negligently failed to render her proper and sufficient assistance in boarding the train and, in stepping from the ground to the step on said car, plaintiff, without any fault or neglect on her part, and by reason of the great distance of the step from the ground that she was required to make, and by reason of the said negligence of defendant's servants, and of the premises aforesaid, and because of the lack of assistance from said servants, sustained severe and permanent injuries, which are particularly stated as being the displacement of the right ovary the rupture of the organs of the "pelvic and ileocolic and right inguinal region, and the straining of the right fallopian tube, and a disarrangement of the uterus, etc. The defendant moved the court to require the plaintiff to specify what particular organs of the "inguinal region" were ruptured, and in what manner and to what extent the uterus was disarranged and the right ovary displaced; to state what particular organs were ruptured, whether they



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were "nerves, muscles, or intestines," etc. This motion the court denied, and of this ruling appellant complains.

By the express provisions of the code, section 376 R. S. 1881, section 379 Burns 1894, section 376 Horner 1897, when the allegations of the pleading are so uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendments. It is essential that the issuable facts alleged in the complaint be stated in a sufficiently certain or definite manner so as fully to inform the defendant of what is alleged against him, and thereby prepare him to meet the charge by his defense. Beyond this the pleader is not required to go. This rule is a familiar one and well settled by repeated decisions of this court. The complaint at bar certainly cannot be said to be open to the objection that it is vague or uncertain in its description of the injuries sustained by the appellee as a result of the wrong imputed to appellant, therefore the motion to make more specific was properly overruled.

Appellant demurred separately to each paragraph of the complaint. This demurrer was overruled, and in this court, instead of assigning the separate rulings on demurrer as errors, appellant has assigned only "that the court erred in overruling appellant's demurrer to appellee's complaint." By this assignment the complaint must be considered as assailed by the demurrer as an entirety, and hence, under the circumstances, both paragraphs of the complaint must be shown to be insufficient in order to render the assignment available in this appeal. Elliott's App. Proc. section 377. Therefore, we may limit our consideration relative to the sufficiency of the complaint to the second paragraph alone, for if the latter is sufficient, we need not extend our investigation to the objections urged against the first paragraph. Again, upon another view of the case, the special verdict of the jury apparently follows the material facts as averred in the second paragraph of the complaint; consequently, a cor-

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rect decision upon the law may be made on the facts as set out in the special verdict, and therefore, an erroneous ruling on a demurrer to the first paragraph of the complaint, under such circumstances, will not constitute reversible error. *Smith v. Wells Mfg. Co.*, 148 Ind. 333, and cases there cited.

It is insisted by appellant's learned counsel that, under the facts disclosed by the complaint, contributory negligence must be imputed to the appellee. The facts averred in the complaint show, as heretofore stated, that appellant neglected to construct and maintain a platform at its station at the town of Ullin; that the train upon which appellee was intending to and did take passage upon the occasion in question, on its arrival at the station of Ullin, was stopped by appellant at a point on its track where there was no platform, and where the distance between the ground and the lowest step of the series of steps leading up to the platform of the car which appellee boarded was three feet. The servants of appellant in charge of the train on this occasion invited appellee to board the car in the position or at the place at which it was then standing waiting to receive passengers. It appears that it had been the custom, previously, of the defendant company at this station, before inviting passengers to enter its cars to furnish a stool to facilitate their reaching the steps leading to the platform of the car; but on the occasion of the accident it failed to make this provision, although appellee, it seems, requested that the stool be furnished for that purpose. It is true that it is disclosed by the facts that she, on approaching the train, observed the distance between the ground and the first step of the series leading up to the platform of the car, but it also appears that the servants of appellant in charge of the train, under the circumstances, gave her assurance that they could and would assist her to board the train in safety at the point where it was standing, and she, believing and relying upon their promises and assurances of safe assistance, made the effort to enter the car,

and in so doing, without any fault or negligence on her part, was injured.

Counsel for appellant, among other things, insist that appellee must be held to be guilty of contributory negligence; first, because of her failure to demand, before attempting to board the train, that it be placed at a point where to board the same would have been rendered more convenient and safe, and second, in attempting to board the car after she saw the distance between the ground and the car step. There are no tenable grounds urged to exempt appellant of the negligence attributed to it. That actionable negligence must be imputed to appellant, under the averments of the complaint, cannot be successfully controverted. The facts therein alleged show that the train was stopped on the occasion of the accident at the station in question at a point where there was no platform, and where the distance from the ground to the first car step was three feet. In this condition of its train, without procuring a stool or furnishing any other means to facilitate the entry to its car upon the part of passengers, it, through its servants, invited appellee to take passage upon the train, and, in addition to its invitation or direction, gave her assurances that it would assist her to board the car in safety. To reach the lowest step of the car it appears that it became necessary, under the circumstances, for her to step upwards from the ground at the point where the car stood a distance of three feet, and thereby, it seems, she was subjected to an excessive strain or compression which resulted in the injuries of which she complains.

No doctrine is better settled than that which exacts of, and imposes on, railroad companies engaged as common carriers of passengers the duty of stopping their trains at stations at proper and safe places for the exit and entry of passengers, and also to provide suitable and safe means by which they may leave and enter the cars; and a failure to discharge these obligations, when such failure results in injury to a passenger, in the absence of contributory negligence on the part

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of the latter, renders the company guilty of actionable negligence. 4 Elliott on Railroads, section 628; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L. R. A. 687; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; *New York, etc., R. Co. v. Doane*, 115 Ind. 435; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193; *Lucas v. Pennsylvania Co.*, 120 Ind. 205; *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533; *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514; *Missouri Pacific R. Co. v. Watson*, 72 Texas 631, 10 S. W. 731; *Eichorn v. Missouri, etc., R. Co.*, 130 Mo. 575, 32 S. W. 993.

In respect to the contention of counsel that, under the facts alleged in the second paragraph of the complaint, contributory negligence must be imputed to appellee, it may be said that it is a familiar rule of pleading, and one well settled by numerous decisions of this court, that a general averment in a complaint for personal injuries, to the effect that the plaintiff was injured, without any fault upon his part, is sufficient to show the absence of contributory negligence, unless the latter is clearly disclosed by other specific averments in the complaint. It certainly cannot be asserted that the facts especially pleaded in the complaint in this case, notwithstanding the general averment that appellee was without fault, are of such a character or nature that the court is required to adjudge as a matter of law that appellee was guilty of contributory negligence. At the time of the alleged accident, as the averments of the complaint show, she was a woman of thirty-five years of age, strong and active, and, while it is true that the complaint alleges that she observed the distance between the ground and the car step before she made the attempt to board the train, nevertheless it is also clearly disclosed that she made the attempt which she did in pursuance of the express invitation or direction of appellant's servants in charge of the train, and upon the assurances which they gave that they would assist her safely to overcome the difficult circumstances which confronted her. The

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danger to which she was exposed cannot be said to have been so known or apparent that a prudent person, under the circumstances, would not have encountered the peril of attempting to board the car. Therefore she had the right to rely on the promises or directions of the servants of appellant, and assume that if she followed their directions her entry upon the car would not be attended with danger. The employes of a railroad company in control of its trains represent the corporation, and are at least presumed to have such experience and knowledge in their business as will enable them properly to advise or direct passengers to enter or alight from such trains safely. As a general rule, a passenger is justified in obeying or heeding the directions of the servants or agents of the carrier, and in relying upon their assurances that it is safe for him to act, under the particular circumstances, unless such obedience or assurances will expose him to such known or apparent danger that an ordinarily prudent person would not encounter. The mere fact that it appears, under the circumstances, that, had the passenger not obeyed such directions, he would have escaped the injury which he sustained, will not relieve the carrier of liability. In support of the above principles, see the following authorities: *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549, and cases there cited; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381; *Pennsylvania Co., v. Hoagland*, 78 Ind. 203; *Nave v. Flack*, 90 Ind. 205; *Louisville, etc., R. Co. v. Kelley*, 92 Ind. 371; *Prothero v. Citizens' St. R. Co.*, 134 Ind. 431; *Olson v. St. Paul, etc., R. Co.*, 45 Minn. 536, 48 N. W. 445; *Lewis v. Delaware, etc., Canal Co.*, 145 N. Y. 508, 40 N. E. 248; *Weiler v. Manhattan R. Co.*, 6 N. Y. Supp. 320; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *Hinshaw v. Raleigh, etc., R. Co.*, 118 N. C. 1047, 24 S. E. 426; *Watkins v. Raleigh, etc., R. Co.*, 116 N. C. 961, 21 S. E. 409; *Baltimore, etc., R. Co. v. Leapley*, 65 Md. 571, 4 Atl. 891; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519; *St. Louis, etc., R. Co. v. Rosenberry*, 45 Ark. 256; *Baltimore, etc., R. Co.*

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v. *Kane*, 69 Md. 11, 13 Atl. 387; *Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553, 53 N. W. 724; *Davis v. Louisville, etc., R. Co.*, 69 Miss. 136, 10 South. 450. While a person, as a general rule, may avoid the charge of contributory negligence, when it appears that he received the injury of which he complains while acting in obedience to the directions of the defendant, yet, if the danger is obvious and of such a character that an ordinarily prudent person would not incur the peril, then the passenger, as the authorities generally affirm, is not warranted in obeying the directions of the carrier's agents or servants, or in relying on their assurances of safety. Whether the act of appellee in attempting to board the car, by which she sustained the injury in question, constitutes contributory negligence, depends upon whether the danger was so patent that an ordinarily prudent person, under the circumstances, would not have made the attempt; and this was a question of fact which she had a right to have submitted to the jury for their determination. Negligence, generally speaking, is held to be a mixed question of law and fact, and a court cannot adjudge an act to be negligent, as a matter of law, unless it is such as all reasonable men would be likely to deduce an inference of negligence therefrom. If the inference is doubtful, the question then becomes one of fact for the decision of the jury under the proper instructions of the court. *Stoner v. Pennsylvania Co.*, 98 Ind. 384. It follows that the objections urged against the complaint are not tenable, as it sufficiently states a cause of action, and the demurrer was therefore properly overruled.

It is next contended that the trial court erred in not embodying in the special verdict, at the request of appellant, certain interrogatories. In answer to this contention it may be said that some of these interrogatories did not call for a finding by the jury of essential facts within the issues of the case, and hence were properly rejected. Others of them

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were substantially covered by those submitted by the court. The burden of establishing the facts essential to a recovery under the issues rested upon appellee, and, in the event the special verdict did not state the material facts in her favor, she could not recover, as the court will supply nothing by intendment. In view of this fact, we fail to recognize in what manner appellant was injured by the refusal of the court to make the interrogatories in question a part of the special verdict. All that was necessary, in preparing the verdict to be submitted to the jury, was for the court to require that it should be so framed by the means of interrogatories that the jury thereby could find, under the evidence, all of the material facts of the case,—the undisputed ones as well as those which were disputed, and when a special verdict is so framed, neither party can successfully complain. *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186. When tested by this rule of practice, the verdict in the case at bar, as formulated and submitted to the jury, must be held to be substantially sufficient; consequently, upon no view of the case was there any prejudicial error in the court's refusing to embrace therein other interrogatories at the request of appellant.

It is also insisted that the court erred in incorporating in the special verdict certain interrogatories which, it is claimed, required the jury to state conclusions of law instead of material facts. If this be true, however, the harm resulting to appellant, if any, does not necessarily result by reason of the submission of the interrogatories which called for a conclusion of law, but must arise from the fact that the court, under the circumstances, rendered judgment against defendant on an insufficient special verdict; for the rule is that such a verdict will be upheld if it contains facts sufficient, after eliminating improper matters therein embraced, to sustain the judgment. *Reeves v. Grottendick*, 131 Ind. 107, and cases there cited.

It is also claimed that the verdict is vitiated for the reason

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that it does not contain a formal closing to the effect that if, upon the facts found, the law is with the defendant, then the jury finds in its favor. There is no merit in this contention.

Where the facts in such a verdict are properly stated, an omission of the formal conclusion will not vitiate it. *Bower v. Bower*, 146 Ind. 393, and cases there cited.

Counsel for appellant criticise as erroneous certain instructions given by the court. Appellee's counsel contend, however, that the instructions in question have not been made a part of the record by a bill of exceptions nor under the provisions of the code, section 544 Burns 1894. An examination of the transcript verifies appellee's contention, therefore, under a well settled rule, the instructions are not subject to review in this appeal.

Omitting the facts stated in the verdict, which go to show that appellant is a duly organized corporation, engaged as a common carrier in operating and controlling a railroad which passes through the town of Ullin, in the state of Illinois, etc., the other facts therein may be summarized as follows: On and prior to January 13, 1895, appellant maintained a station on its railroad at the town of Ullin, in the state of Illinois, where its trains stopped for the purpose of receiving and discharging passengers. At this station it maintained a platform, constructed out of cinders, from which passengers were taken aboard its trains. This platform was about 240 feet in length, and was constructed in such a manner as to be about two inches lower than the tops of the ties of the railroad. On said 13th day of January, 1895, appellee was the holder of a mileage ticket which entitled her to be carried as a passenger on appellant's trains, and on that day she became a passenger at the said station on one of its passenger trains for the purpose of going to Effingham, in the state of Illinois. On the arrival of the train upon which appellee embarked at said station on that day, the servants in charge thereof stopped it at a point south of this platform so that the ladies' car connected with said train stood at a point



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where there was no platform, and where the distance between the ground and the first step of this car was thirty inches. This train consisted of an engine and tender, a mail and baggage car, smoking car, a ladies' car, and a sleeping car. After the train stopped, appellant's brakeman on said train invited appellee to come to the ladies' car, and board it as it then stood. She, in response to this invitation, went to the north end of this car, but before attempting to board it, she, as the jury finds, protested against attempting to step the distance between the ground and the car step, which the jury find was thirty inches. Appellant provided no foot stool or step of any kind to enable appellee to board this car, but the brakeman assured her that he would assist her safely to board the car in the position, or at the point where it stood, without the use of a footstool. She relied on these assurances of the brakeman, that he would assist her to enter the car safely, and made an effort to board it. The brakeman did assist her in her effort by taking hold of one of her arms, but in no other manner did he lend her any assistance, nor did she receive any other assistance. Appellee, at the time she took the step and made the effort to get aboard the car, did not, under the circumstances, believe that the step was dangerous, nor that she was liable to injure herself if she made the step. In making this step she was injured by displacing her right ovary, rupturing and tearing the broad ligaments and the organs in the pelvic and right inguinal regions of her body. She also strained the fallopian tube, and displaced the uterus. These injuries were caused by the compression of the pelvic contents, produced by the effort required on her part to board the car, and on account thereof she became sick with acute traumatic pelvic peritonitis. Prior to her sustaining these injuries, she was in reasonably good health and sound in body. After being so injured, she traveled by rail from Ullin to her home in Greencastle, Indiana, a distance of about 200 miles, at which place she arrived on the next morning, January 14, between three

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and four o'clock. On arriving at the station at Greencastle, she was suffering with pain and sickness but, notwithstanding this, she walked half a mile to her home in that city over a broken path through the snow. Appellee incurred as expenses on account of the employment of nurses, and for medical treatment, \$660, and the jury find that she has sustained damages to the amount of \$14,000, which sum, in the event she is entitled to a recovery upon the facts found, they assess as her damages. The jury also find or state that the plaintiff (appellee), in stepping upon the car at the time she was injured, exercised such care as a person of ordinary prudence and caution would do under like circumstances. This latter finding may be said to be but an inference drawn by the jury to the effect that the plaintiff, under the circumstances at the time of the accident, was not guilty of contributory negligence. In this summary of the facts we have eliminated such of the findings embraced in the verdict as may be said to be open to the objection that they state conclusions rather than facts.

It is insisted by appellant's counsel that the facts found by the jury in the special verdict disclose contributory negligence upon the part of the appellee; hence bar a recovery. The facts stated in the special verdict, we think, may be said fairly and substantially to accord with those averred in the second paragraph of the complaint. They certainly show a breach of duty on appellant's part by stopping the car at a point where, by reason of the distance intervening between the ground and the car step, it was rendered not suitable or safe for the entry of passengers thereon, especially ladies, and inviting appellee, through its servant the brakeman, to board the car without providing her with some suitable and safe means to serve her for that purpose.

In the light of the authorities cited upon the question of the sufficiency of the complaint, it surely cannot be successfully controverted but what the facts returned by the jury, when considered with the legitimate inferences which may

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be drawn therefrom, establish against appellant the charge of actionable negligence, and justify the conclusion that there was an absence of contributory negligence on the part of the appellee. We need not repeat what we have heretofore said in regard to the question of her negligence in our discussion of the facts averred in the complaint. It may be said, we think, that the facts found by the jury show that she exercised ordinary care. In *Louisville, etc., R. Co. v. Schmidt*, 147 Ind. 638, it is said: "The law interprets ordinary care to be of that degree which a person of ordinary prudence, under the particular circumstances is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that may result from the neglect."

Upon another view of the case, it is sufficient to say that the facts disclosed by the verdict, relative to the feature of contributory negligence on appellee's part, are, at least, such as would warrant reasonable men in drawing two inferences therefrom, one of which would be that she was not guilty of contributory negligence at the time the accident occurred. Such an inference, we have seen, was drawn by the jury in their verdict. In such cases as this, where two inferences, under the facts, may be said to arise, the jury, having drawn one, in regard to the ultimate fact of contributory negligence, in favor of the complaining party, such inference will be accepted by the court as conclusive. *Smith v. Wabash R. Co.*, 141 Ind. 92; *Cleveland, etc., R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141, and cases there cited. Therefore, under the circumstances, if we were inclined to draw from the facts an inference unfavorable to appellee upon the question of her negligence, we would, nevertheless, abide by the rule stated and accept the one drawn by the jury to the effect that there was freedom from such negligence upon her part, as controlling. Without further extending this opinion upon the questions arising

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on the special verdict, we hold that it was sufficient to entitle appellee to the recovery of a judgment.

Appellant, under its motion for a new trial, challenged the damages assessed as excessive. It is insisted that the special verdict does not find that the injuries which appellee sustained are permanent, and, therefore, it is insisted that the damages must be held to be excessive. But appellant in the lower court raised this question only by assignment, as one of the grounds in its motion for a new trial,—that the damages were excessive; hence, under the circumstances, in support of this assignment, the court must look alone to the evidence and not to the facts disclosed in the special verdict. We regard the judgment a large one, and it certainly was the duty of the trial judge to closely scrutinize and review the evidence and circumstances in the case to discover whether the jury was too liberal in their award of damages, and, if he found such to be the fact, promptly to grant a new trial or require a remittitur. The trial judge, by overruling the motion for a new trial, in effect approved the assessment of damages, and we are not able to say that he violated his duty. No precise rule can be laid down for the award of compensation in cases of this kind, where the injury sustained is permanent, and will entail constant suffering upon the injured party. The mere fact that the damages may appear to this court on appeal to be excessive will not alone justify it in disturbing the judgment, unless the assessment is so large as to induce the belief that the jury was actuated by prejudice, partiality, or corruption. *Evansville, etc., R. Co. v. Talbot*, 131 Ind. 221; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533.

There is evidence in the case to show that appellee, at the time of the accident, was thirty-five years of age, and in good health. By reason of her injuries her health has been greatly impaired, and she has been subjected to intense suffering and was sick for a long period of time. Her injuries, as the evidence discloses, are apparently per-

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manent, and will subject her to constant pain in the future. In describing the extent of her suffering in her evidence before the jury, she said: "I never suffered so in my life, at that period, or at any other up to this time. It seemed that everything in my body, every organ, would leave my system. It was intense pain and a bearing down feeling." There is evidence also going to show that appellee cannot be cured of her injuries, except possibly by the performance of a surgical operation by which the injured organs, etc., may be removed, but such an operation, as the evidence tends to show, would be quite critical, and might imperil her life. We cannot adjudge upon the evidence in the case that the judgment ought to be disturbed upon the ground of excessive damages. We have examined and read the evidence, and find that it is sufficient in other respects to sustain the material findings of the jury in the special verdict, and, under a well settled rule of appellate procedure, we cannot weigh it and determine upon which side lies the preponderance, as that duty rested upon the jury, subject to review alone by the trial court.

The alleged misconduct of the jury, which appellant seeks to present for review in this appeal, cannot be considered, for the reason that the affidavits filed upon the trial of that issue have not been brought into the record by a bill of exceptions. *Forsyth v. Wilcox*, 143 Ind. 144; *Naanes v. State*, 143 Ind. 299.

Appellant also complains of the exclusion of certain evidence, but this question is not properly before us, for the reason that the record does not disclose that any statement was made as to what appellant proposed to prove by the witnesses in question. The rule is well settled that to render the action of the trial court in excluding evidence available, the record, on appeal to this court, must clearly show that the witness was asked a pertinent question, and, upon objections being interposed, a statement was made by the party offering the evidence showing what was pro-

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posed to be proved by the witness in answer to the question. *Shepard v. Goben*, 142 Ind. 318, and cases there cited.

Other alleged errors of the trial court are discussed by counsel for appellant, but we recognize in these, under the circumstances, no available error, and while we have given these questions due consideration, we do not deem it necessary or profitable to extend this opinion further by setting them out in detail. We have fully considered all of the questions presented by the learned counsel for appellant, but are unable to agree with them that there is any available error disclosed by the record, and the judgment is therefore affirmed.

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152 680  
159 85  
159 688

[No. 18,376. Filed Dec. 30, 1898. Rehearing denied July 7, 1899.]

152 680  
161 428  
161 679  
161 688  
163 96

**MASTER AND SERVANT.—Fellow Servant.—Damages.—Personal Injuries.**—Plaintiff was employed to assort and grade pieces of timber to be used as wheel rims, and to do other common labor about defendant's factory. H., who was employed to do similar work, and who had been authorized by the foreman of that department to direct the men as to the details of the work while he was temporarily absent in another part of the building, instructed plaintiff to remove some lumber from the room in which the rims were stored. H. assisted plaintiff in removing the lumber, and through his negligence alone the rims fell upon plaintiff and injured him. *Held*, that H. was acting solely as a fellow servant, and not as a representative of defendant, and as his negligence was the sole cause of the injury, plaintiff cannot recover. *pp. 680-688.*

152 680  
164 516  
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166 269  
168 227  
168 689

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169 30  
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152 680  
171 622  
171 623

**SAME.—Fellow Servant.—Employers' Liability Act.**—Plaintiff is not entitled to recover under subdivision 2 of section 1 of the Employers' Liability Act (Acts 1893, p. 294) for a personal injury sustained while in the employ of defendant, where the injury was caused wholly by one engaged with him in the work, but who was placed in charge of the men by the foreman while he was temporarily absent in another part of the building. *pp. 688-691.*

From the Hancock Circuit Court. *Affirmed.*

*W. J. Beckett, R. A. Black and D. W. Howe*, for appellant.

*W. H. H. Miller and J. B. Elam*, for appellee.

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JORDAN, J.—Appellant commenced this action in the Marion Superior Court to recover damages, and on his motion the venue was changed to the Hancock Circuit Court, wherein a trial before a jury resulted in a general verdict awarding him \$5,000, and with this verdict the jury returned answers to certain interrogatories. The court on motion of appellee rendered judgment in its favor upon the answers returned to the interrogatories, notwithstanding the general verdict. From this judgment appellant appeals, and the only question presented for our decision is, do the facts found by the jury in answer to the interrogatories entitle appellee to the judgment rendered in its favor by the lower court, notwithstanding the general verdict?

The action is for personal injuries sustained by appellant while in the employ of appellee, and the legal questions involved are those pertaining to master and servant.

The complaint is in two paragraphs, and the following may be said to be, in substance, the facts therein set forth: Appellee is a corporation engaged in the city of Indianapolis in manufacturing buggy and light wagon wheels, and, among others, employed appellant to work in its factory in the labor of assorting wheel rims, and in doing other work. It was his duty under his employment to take these rims, which consisted of strips of green hickory seven feet long and two inches square, and grade, and stack them on their ends in stalls prepared for that purpose against the side of the shed or building belonging to the factory. Over the department in which he worked, there was a foreman employed by appellee whom the latter had invested with the authority to direct the workmen therein, where each should work and what work each should perform, and this foreman had authority to employ, discharge, and keep the time of the employes under him. In one of said stalls there had been piled on their ends some heavy pieces of timber about four or five feet long, fourteen inches wide, and four inches thick. On December 24, 1895, it became necessary to move these

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timbers in order to secure more room in which to pile the hickory rims, and appellant was directed by the foreman to remove these pieces of timber, and, in order to do so, it was necessary for him to go for a distance of six or eight feet between two columns of the wheel rims which had been piled in the shed as heretofore stated. These rims on the east side of the shed, or building, extended out beyond the arms or strips which had been placed there to support them, and aside from these arms there was nothing else to support the rims or prevent them from falling, which fact was known to said foreman, but not known to appellant. While the latter was engaged in removing the timbers in question, the foreman stood at the opening of the stall, and supported the projecting rims until appellant had removed all of the timber except one or two pieces, and it is then alleged that while the latter was bending over, with his back towards the pile of rims, the foreman negligently released and abandoned his said support, and, by reason thereof and without any fault or negligence on the part of the appellant, a large number of the rims fell on appellant's back and injured him, as alleged.

The second paragraph is substantially the same as the first, except there is an attempt made to base it on the second subdivision of section 1 of an act of the legislature regulating the liability of railroads and other corporations, approved March 4, 1893. Acts of 1893, p. 294. Neither of these paragraphs was demurred to in the lower court, and while we do not and need not pass upon their sufficiency to constitute a cause of action, that, at least, may be said to be questionable.

Both paragraphs of the complaint apparently proceed upon the theory that the accident in question was due to the alleged negligence of appellee's foreman in releasing his hold upon the wheel rims, by reason of which they fell upon appellant. The facts material to the question herein involved, as disclosed by the answers returned by the jury to the interrogatories, in substance, are as follows: Appellee is



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a corporation engaged in the business of manufacturing parts of buggy and wagon wheels. Appellant had been in its employ as a common laborer doing various kinds of work, for about seven years prior to the accident. About eighteen months before he was injured he was transferred to the saw-room of appellee's factory, and there was engaged in assorting and grading strips for wheel rims, and this, in the main, was the only kind of work which he performed; but, under his employment, he was liable to be assigned to any common labor necessary to be done about the factory. The wheel rims were sawed from green hickory lumber, and were about one and one-half by one and three-eighths inches square, and from six to seven feet long, and these rims were ricked in stalls, being kept separate by projecting arms and pieces of timber dividing the space along the building into stalls which were about four or five feet wide. The pieces of lumber dividing the stalls were six feet above the ground and projected from the wall about four feet. The wheel rims were ordinarily removed from the stalls where the graders placed them within a few days. Some time before the accident several pieces of pine lumber, about five by six inches in size and six feet long were placed against the rims which had been previously piled, and during the day of the accident these pieces of pine lumber were covered over with other rims. One Bosler was the general manager of appellee's factory, and was usually present superintending the work. Under Bosler there were some eight foremen in charge of different parts of the work being done in the factory. A Mr. Saulsbury was one of these foremen, and he was in charge of the saw-room where appellant worked, and superintended the work in the saw-room and in the yard adjoining thereto. Saulsbury had authority to employ and discharge employes under him, and he was usually in the saw-room and about the premises in the yard near thereto several times during a day. Generally about seven men were employed in the saw-room,—two or three operated

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the saws, and one was engaged in bringing material from the yards to the saws, and two or three were engaged in assorting and grading the rims after they were sawed. One of the seven men working along with appellant in the saw-room was named Huey, and he worked as a grader and assorter of the strips and rims and in addition to this work it was also his duty to file the saws, and he had been so engaged about two months prior to the accident. Huey, in like manner as his associates, received instructions in regard to his work from Saulsbury the foreman, and he had no authority either to employ or discharge any of the men working with him, and had no authority permanently to transfer employes from one kind of work to another. In the absence temporarily of the foreman from the saw-room, Huey, under instructions given him by the said foreman, was authorized to give directions in regard to bringing material from the saw-room, and to direct the men employed with him in the room in respect to the details of the work being done during the time that Saulsbury, the foreman, was temporarily absent in other parts of the premises, and the foreman had directed the men to receive instructions from Huey in his absence; but no one having any connection with appellee, except Saulsbury, had given Huey any authority. At the time appellant was transferred to work in the saw-room, Saulsbury informed him that he would be under the supervision of Huey and that he should obey the instructions of the latter in matters pertaining to his work in the saw-room. On the morning of the accident, Huey told appellant that it would be necessary to remove the pieces of pine lumber in question from where they had been previously placed, as one of the carpenters required their use, and he then directed appellant, who at the time was engaged in assorting strips in the saw-room, to go to the north side of said room and remove the pieces of pine lumber, and in giving this direction, or order, Huey was acting under the authority given him, as before stated, by Saulsbury the fore-

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man, but the latter was not present when this direction was given by Huey to appellant. The work of moving this pine lumber was not a proper part of the work of the graders or sorters, and Huey ought to have called upon Saulsbury, the foreman, to send other men to do such work. Appellant at first refused to do this work, but Huey threatened to report him to the office unless he did. Huey and appellant then went to work together to remove the pine pieces. Huey partly uncovered these pieces by removing a part of the rims which were on top of them, but did not remove all of them before appellant went into the stall. When appellant went into the stall to remove the pine lumber, Huey told him that he would stand at the mouth of the stall and hold the slats or rims so as to prevent them from falling, and appellant relied upon what Huey said in this respect. Huey stood at the mouth of the stalls, holding the slats or rims, when appellant entered the stall, and continued to stand there until the latter had removed and deposited in the yard five or more of the pine pieces, and had returned to the stall. After appellant's return to the stall, he took hold of a piece of pine lumber and was trying to move it, and, while so doing, Huey, without notifying appellant of his intentions, released his hold upon the rims and went out of the building into the yard, leaving the rims unsupported, by reason of which they fell upon appellant while he was in the act of removing the pieces of pine lumber, and caused the severe injury of which he complains.

Appellant at the time of the accident, as the jury find, was acting as a reasonably prudent man, but Huey was not so acting. No officer, agent, or employe of the appellee, and no one, except Huey, had anything to do with the accident to appellant; and the jury further find that the place where appellant was at work when the accident occurred was not a dangerous one in which to do work if Huey had continued to hold the rims or slats as he was doing.

Under the averments of the complaint, the foreman or

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agent of appellee therein mentioned, to whom the negligence causing the accident to appellant was imputed, is alleged to have been invested with the powers or duties of a vice principal in the department over which he exercised superintendence. He had, it is alleged in the complaint, authority to employ and discharge the men who were under him as employes of appellee. The facts disclosed by the answers to the interrogatories present a case materially different from the one set forth in the complaint. Huey, to whom the negligence, under the facts disclosed by the interrogatories, is imputed, is expressly shown by the facts not to have had any such power which authorized him to employ or discharge any of appellee's employes. If it can be said that he occupied a position higher than that of a fellow servant, it was because the foreman, Saulsbury, would leave him in charge of the work in which he and his associates were engaged when he, the foreman, was temporarily absent in other parts of the premises.

Reduced to a simple question, the facts show that Huey was the sole cause of the accident by which appellant was injured. Or, in other words, the negligence of appellee, if any, consisted alone in the act of Huey releasing his hold upon the rims, under the circumstances, as he did, at the time appellant was engaged in removing the pieces of pine lumber. Neither the facts alleged in the complaint nor those revealed by the special findings of the jury go to show that the place where appellant was at work, at the time he sustained his injury, was unsafe or dangerous, and the jury expressly find that it was not, except as it may have been rendered dangerous from the fact alone that Huey withdrew the support he was giving to the rick of rims by means of holding his hands against the same. That appellee did not owe to appellant, as its employe, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives in the manner as Huey was doing just previous to the accident, is certainly evident. If

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it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was, would in legal contemplation, be required to be present at all times and places at its factory when lumber, timber, or iron, or other heavy material of like character was being handled or moved by some of its employes, and by the hands of such agent or representatives prevent such iron, timber, or lumber, or other material connected therewith from slipping and falling upon said employes and thereby injuring them. Huey, in lending the support which he did to the pile of rims in question at the time he and appellant were engaged in removing the pine lumber, in no sense can be said to have been a representative of the appellee entrusted with the duty of seeing that the place where appellant was working at the time of the accident was safe. He and appellant were associated together as employes engaged in the same common service,—that of assorting and grading the strips or rims after they were sawed, and he was nothing more or less than one of appellant's fellow servants. Certainly, in the assistance which he lent to appellant while the latter was removing the pine lumber by supporting the pile of wheel rims with which the lumber was connected, he was acting solely as fellow servant, and not as a representative of appellant's master. If it could be said, upon any view of the case, under the circumstances, that he was of a higher rank than appellant, still it must be true that his act, to which appellant attributes his injuries, was that of a fellow servant. For it is true that even an agent or representative of a high rank may at the time an act is done be a fellow servant of an employe who occupies a subordinate position. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 124, 6 L. R. A. 584.

The facts returned by the jury clearly show that the act or omission of Huey, resulting in the injury to appellant, did not involve a duty which the master owes to his servant. The negligence, if any, is shown to have been that solely of

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a fellow servant, and the rule of the common law must control, and precludes a recovery. Appellant, therefore, was not entitled to be awarded a judgment upon the general verdict. The following decisions fully support this conclusion: *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Indiana Car Co. v. Parker*, *supra*; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486, and cases there cited; *Peirce, Rec. v. Oliver*, 18 Ind. App. 87; *Salem, etc., Co. v. Chastain*, 9 Ind. App. 453.

The facts revealed by the answers to the interrogatories, when stripped of conclusions and assumptions, as they must be, clearly show also that appellant is not entitled to recover under subdivision 2 of section 1 of the Employers' Liability Act of 1893, section 7083 Burns 1894, section 5206s Horner 1897. That part of section 1 of the act necessary to the consideration of the question, as here involved, provides that, "Every railroad or other corporation, except municipal, operating in this State, shall be liable in damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: \* \* \* Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform."

Counsel for appellant assail the validity of this act so far as it relates to corporations other than railroads, but under its provisions, as the facts disclose, appellant is not entitled to a recovery, and its constitutional validity may therefore be dismissed without consideration. The facts certainly show that Huey, in the position which he occupied in the service of appellee, was not a person, contemplated by the statute, to whose orders appellant was bound to conform or yield obedience. He was but a fellow servant engaged in the same common labor with appellant, and in no manner was he the

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representative of the appellee in giving the order or directions to appellant which he did. It is shown that he had no more authority to speak or give directions for his master than had appellant. The mere fact that Saulsbury, his foreman, may have temporarily left him in charge of the work in the saw-room did not invest him with the powers of such foreman, nor put him in a position at the time to be the representative of appellee so as to require his associates engaged with him in the same labor to conform to his orders. If Saulsbury the foreman could in this manner without any authority expressed or implied, from appellee, delegate the powers which he possessed to Huey, then the former might select any person in his place or stead to represent his master, or principal, and thereby render the latter liable for the acts or orders of such person. This, it is evident, under the circumstances, he could not legally do. It is a general rule of the law that the agent or representative of another, in the absence of authority expressed or implied from the latter, cannot delegate his powers or confer them upon another. Where the duties which he has been selected to discharge require the exercise of skill, judgment, or discretion, the reasons why he may not delegate his power or authority are obvious. The trust and confidence reposed in him by his principal is personal to him, and, without authority, he is not permitted to transfer it to another, whose ability, judgment, or discretion might not be known to the principal, or, if known, the latter might not select him as his representative or agent. Story on Agency, (9th ed.) section 13; Mechem on Agency, sections 185, 186. In fact, the jury find that Huey ought to have called upon Saulsbury, the foreman, to send other men to do the work which appellant was directed to do and in which he was engaged at the time of the accident.

The statute in question certainly intends that where the injury results from the negligence of a person in the service of a corporation, that such person must be one who is by it

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at least expressly or impliedly authorized to give the order or direction, and thereby require the employe to obey. If he is not, then, in a legal sense, the employe is not bound to conform to his order. Huey, as we have seen, is shown by the facts not to have been invested with this power or authority by appellee, and consequently was not the person whom the statute contemplated as the one to whose orders appellant was bound to conform. This interpretation finds support in the general scope of the statute, and as the act is in derogation of the common law, it must be strictly construed. But, conceding that Huey was such a person at the time he directed appellant to remove the pine lumber, the negligence in question is shown not to have resulted in any manner from the order which was given to appellant, but resulted wholly by reason of the negligence of Huey in his failure to continue to support the rims by means of his hands. This negligence of Huey's, occurring subsequent to the giving of the order, when he may be said to have been engaged in assisting appellant to remove the pine pieces, is not a negligence for which appellee is liable within the meaning and intent of the second subdivision of section 1. The following cases, some of them directly and others by analogy, support the construction which we give to the statute: *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167; *Dixon v. Western Union Tel. Co.*, 68 Fed. 630; *City Council v. Harris*, 101 Ala. 564, 14 South. 357, 22 L. R. A. 361; *Dantzler v. De Bardeleben, etc., Co.*, 101 Ala. 309, 14 South. 10; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135, 70 N. W. 1078; *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857; *Howard v. Bennett*, 58 L. J. Q. B. 129; *Wright v. Wallis*, 3 Times Law. Rep. 779; *Kellard v. Rooke*, 57 L. J. Q. B. 599; *Gibbs v. Great Western R. Co.*, 53 L. J. B. P. & E. 543; *Burns v. Washburn*, 160 Mass. 457, 36 N. E. 199. To place the construction upon the statute which counsel for appellant contend, and thereby hold appellee liable, under the circumstances, for the negligence of Huey, would result in



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subjecting to liability every corporation in the State for the injury sustained by one of its employes through the negligence of a fellow servant, having no greater power or authority than had the injured employe. Upon any view of the case, the facts found by the jury in their answer to the interrogatories, are wholly incompatible with the right of appellant to a judgment on the general verdict, and by a well settled rule, under the circumstances, the latter must yield to the facts as specially found by the jury, and the trial court did not err in rendering judgment on appellee's motion in its favor. Judgment affirmed.

## ON PETITION FOR REHEARING.

PER CURIAM.—We held at the former hearing of this cause that, under the facts disclosed by the special findings of the jury in their answer to interrogatories, it was shown that appellant was neither entitled to recover at common law, nor under subdivision 2 of section 1 of the Employers' Liability Act of 1893. It was held that he could not recover under the provisions of the latter statute, because the facts disclosed that Huey had not been placed in authority over him by appellee, and therefore was not a person within the meaning of the law to whose order appellant, as an employe of the former, was bound to conform.

It is now insisted, under the petition for a rehearing, that by this latter holding the court erred. We have again carefully reviewed the facts as found by the jury, and the authorities cited *pro* and *con* by the parties to this appeal, and are constrained to abide by the conclusion reached in the original opinion. Appellant certainly could not maintain this action, under the provisions of the act in question, by simply showing that at the time he sustained the injury he was engaged in removing the lumber in obedience to the directions of Huey, to whose negligence he attributes his injuries; but he would at least be required to go further, and show that such negligent party was a person in the service

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of appellee to whose order or direction, under the particular circumstances of the case, he, as an employe of appellee, was "bound to conform, and did conform." "*Ita lex scripta est.*" The law is so written and means what it expressly declares.

It is clear that the case, as presented by the facts found by the jury, is not one of common law liability, and it is equally clear, we think, that the facts conclusively show that it does not come within the provisions of the Employers' Liability Act. As to whether the negligence imputed to Huey, under the particular circumstances in the case, in the event it further appeared that he was either expressly or impliedly invested by appellee with authority over appellant, so as to give orders and directions, to which orders and directions he was bound to conform, would render appellee liable, we need not and do not decide.

We are referred by appellant's learned counsel to the case of *Wild v. Waygood*, 1 L. R. (1892) Q. B. 783; but the facts in that case are in no wise similar to the facts in this. There it appeared that one Duplea and the plaintiff were engaged in the service of the defendant in constructing a hydraulic lift. Duplea directed the plaintiff to place a plank across the well of the lift and stand on the plank. With this order the plaintiff complied, and, while standing on the plank, Duplea negligently started the lift, which negligent act resulted in injury to the plaintiff. It further appeared in that case that Duplea had been placed by defendant in authority over the plaintiff, and that the latter was bound to and did conform to his orders at the time of the injury. The liability of the defendant in that case, under the provisions of the English statute, which are similar to those of subdivision 2 of section 1, *supra*, was sustained. It was held in the *Wild* case that, in order to establish a liability against the master under the statute, the injured servant, among other things, must show that the injury complained of was the result of the negligence of a person in the employ of the common master to

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*Lewis v. Albertson.*

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whose orders the servant, at the time he sustained the injury, was bound to conform and did conform, and that the injury must be the result of the negligence of the person giving the order and of the injured servant conforming thereto.

The unfavorable feature which confronts appellant, under the facts in this case, is that when they are considered and applied in reference to the plain wording and meaning of the statute, they destroy the very foundation upon which he seeks to construct his cause of action, and necessarily defeat a recovery. They clearly show that Huey had not been placed, either expressly or impliedly, by appellee in a position of authority over appellant at the time of the accident, and hence he was not a person, in any sense within the contemplation of the statute, to whose orders the latter was required to yield obedience. It is true that the jury, in answer to an interrogatory, find that appellant was bound to conform to the orders of Huey. This, however, was but a mere conclusion upon the part of the jury, and can not be accepted as a finding of a fact. As a general rule, a party seeking to enforce a right or remedy provided by statute, in order to prevail, must bring himself, substantially at least, within its provisions. *Harrison v. Stanton*, 146 Ind. 366, and authorities there cited.

The petition for rehearing is overruled.

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**LEWIS v. ALBERTSON ET AL.**

[No. 18,211. Filed January 14, 1908.]

**APPEAL AND ERROR.—***Assignment of Error.—Failure to Discuss.—*

The failure of appellant to discuss an assignment of error amounts to a waiver of the error thus assigned. *pp. 694, 695.*

**APPELLATE COURT.—***Jurisdiction.—Constitutional Law.—Appeal and Error.—*Although the condition of the record and the assignment of error are such as to present the question of the constitutionality of a statute, if the brief of the party is such as not to present it the question is not duly presented within the meaning of section 1336 Burns 1894, providing that "the Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute,

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152	544
152	698
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federal or state, is in question, and such question is duly presented." p. 695.

APPELLATE COURT.—*Jurisdiction.—Transfer of Cause from Supreme to Appellate Court.*—Where by reason of the failure of appellant to discuss in his brief an assignment of error involving the constitutionality of a statute such question is waived and the case thereby comes within the jurisdiction of the Appellate Court, the cause will be transferred to the Appellate Court with the assignment of error waived as completely as if the assignment was not in the transcript at all. p. 695.

From the Lawrence Circuit Court. *Transferred to Appellate Court.*

*Alexander & Willard*, for appellant.

*Elliott & Elliott and Brooks & Brooks*, for appellees.

McCABE, J.—The appellees sued the appellant to foreclose a lien on a certain lot owned by appellant in the city of Bedford, in Lawrence county, for a street improvement made by appellees as contractors with the city authorities, for \$299.46, under the provisions of the act approved March 8, 1889. An answer of eleven paragraphs was filed, upon some of which issues were joined, a trial of which resulted in a judgment and decree for the amount claimed and foreclosing a lien.

Among the paragraphs of answer was the fifth, setting up that the resolution of the council declaring the necessity for the improvement and the contract made by the city authorities with the appellees for the same, were all void because the act of the legislature legalizing the acts leading to the incorporation of the city of Bedford was unconstitutional and void. The circuit court, among many other rulings, sustained a demurrer to said fifth paragraph of answer, and that ruling, among many others, is assigned on this appeal as error. But the appellant's brief in no way alludes to or discusses the question as to the sufficiency of that paragraph of the answer. The question presented to the circuit court by the demurrer to the said fifth paragraph of answer, was the constitutionality of the statute mentioned in said answer.

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But the failure to discuss in appellant's brief the question raised by the assignment of error upon the ruling on that paragraph, is a waiver of the error thus assigned, as has been decided by this court so often that it is deemed unnecessary to cite the cases so holding.

With that question eliminated, the case is one simply for the foreclosure of a statutory lien where the amount in controversy does not exceed \$3,500. Such a case falls within the jurisdiction of the Appellate Court. Acts 1893, p. 356, section 1337 Burns 1894.

Acts 1893, p. 39, section 1336 Burns 1894, provides that: "The Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute, federal or state, \* \* \* is in question and such question is duly presented."

It has been held by this court, substantially, that though the condition of the record and the assignment of error are such as to admit such a question, yet if the brief of the party is such as not to present it, the question is not duly presented within the meaning of the provision we have quoted. *Benson, Adm. v. Christian*, 129 Ind. 535, 537; *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 686; *In re Pittsburgh, etc., R. Co.*, 147 Ind. 697, and authorities there cited.

It would be quite unreasonable to say that a question involved in an assignment of error, having been waived by the appellant in failing to notice or discuss the same in his brief, is duly presented. We do not mean to say that such waiver might not be obviated by afterwards filing a brief discussing the question, before the case is taken up for consideration. That question not being before us, we do not decide it. But we do decide that this case must be transferred to the Appellate Court, with the assignment of error on the ruling on the demurrer to the fifth paragraph of answer waived as completely as if that assignment of error was not on the transcript at all. In that case it would be too late to make it.

The case is accordingly transferred to the Appellate Court.

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Smith v. Board, etc.

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SMITH ET AL. v. BOARD OF COMMISSIONERS OF  
HUNTINGTON COUNTY.

[No. 18,628. Filed Nov. 1, 1898. Rehearing denied April 5, 1899.]

From the Huntington Circuit Court. *Affirmed.**B. M. Cobb*, for appellants.*O. M. Whitelock* and *S. E. Cook*, for appellee.

JORDAN, J.—This is an appeal from the judgment of the Huntington Circuit Court, in a proceeding instituted by the appellee to obtain an additional assessment to meet a deficit in the cost arising out of the improvement of a certain highway, under sections 5091, 5092 R. S. 1881, sections 5091, 5092 Horner 1897.

There was a remonstrance filed by appellants, a trial by the court, and a special finding of facts and conclusions of law thereon in favor of appellee, and judgment was rendered accordingly.

The same questions are involved in this case and are presented in like manner as in the appeal of *Kline v. Board, etc.*, *ante*, 321, and upon the authority of the decision in that cause, the judgment below must be and is affirmed.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COM-  
PANY v. DOMKE.

[No. 17,609. Filed June 28, 1898. Rehearing denied Oct. 14, 1898.]

From the Cass Circuit Court. *Affirmed.**E. C. Field*, *G. W. Kretzinger*, *John McHugh* and *McConnell & Jenkins*, for appellant.*W. R. Coffroth*, *Nelson & Myers* and *Davidson & Storms*, for appellee.

MCCABE, J.—The appellee sued the appellant to recover damages on account of a personal injury received by him through the alleged negligence of the appellant. A trial of the issues formed resulted in a special verdict, upon which the trial court rendered judgment for the damages assessed conditionally by the jury, the court having previously overruled appellant's motion for a new trial.

Both the several paragraphs of the complaint, as well as the facts found in the special verdict, show that the plaintiff's injury was received in and caused by the same collision which caused the death of plaintiff's decedent in the case of *Louisville, etc., R. Co. v. Heck*, 151 Ind. 292, and that appellee here, as the

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Hay v. Marsh.

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decedent there, had nothing to do with the running or management of the work train, he being a bridge carpenter on the work train.

The assignment of errors in this case presents for decision the same questions, and none other, than were decided by this court in the last case referred to, with the exception that the special verdict in this case does not show, as it did in that, that the extra freight train had some verbal notice before it started out that the work train was out. But that can make no difference in the decision of the questions of law involved, as that circumstance, if it has any effect, makes this case weaker for the appellant than the other case. On the authority of that case the judgment in this must be and is affirmed.

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HAY v. MARSH ET AL.

[No. 18,589. Filed Nov. 29, 1898. Rehearing denied June 28, 1899.]

From the Clark Circuit Court. *Affirmed.*

*H. A. Burt, J. E. Taggart, H. M. Dowling and Elliott & Elliott*, for appellant.

*W. H. Watson, J. W. Fortune and L. A. Douglass*, for appellees.

HACKNEY, J.—This case, in its essential features, is like that of *Hay v. Marsh*, ante, 651. The evidence upon the question here presented is identical with that referred to in the case cited and authorizes the conclusion of fraud on the part of the appellant as the grantee of the property conveyed.

On the authority of that case the judgment herein is affirmed.

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THE DEMING-COLBORN LUMBER COMPANY ET AL. v.  
THE UNION NATIONAL SAVINGS AND  
LOAN ASSOCIATION.

[No. 17,960. Filed November 22, 1898.]

From the Lake Circuit Court. *Affirmed.*

*Ibach & Ibach*, for appellants.

*Olds & Griffin*, for appellee.

HOWARD, J.—The questions for decision in this case are the same as in the case with the same title, 151, Ind. 463. On the authority of the latter case the judgment in this case is therefore affirmed.

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Husted v. Nat. Home etc., Assn.

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HUSTED ET AL. v. THE NATIONAL HOME BUILDING  
AND LOAN ASSOCIATION.

[No. 18,569. Filed November 29, 1898.]

From the Madison Circuit Court. *Affirmed.*

*John W. Lovett, Fred. E. Holloway, D. W. Wood and Bagot & Bagot, for appellants.*

*A. M. Wagner, James Bingham and J. R. Long, for appellee.*

HOWARD, J.—This was an action brought by the appellee to foreclose a mortgage on real estate. It was alleged in the complaint that on the 15th day of March, 1893, the appellant Julius B. Husted, then owner of the land in controversy and indebted to appellee, executed the mortgage in suit.

The appellant George H. Van Riper receiver of the Alexandria Lumber Company, filed his answer and cross-complaint, in which he averred that prior to the execution of the mortgage, in the month of January, 1893, the appellant Husted contracted with the lumber company to furnish material to be used in the construction of a building on the premises described in the complaint; that, on the 31st day of the same month, said company began furnishing said material, and continued so to do until the following July, when the company filed notice of mechanic's lien, to secure payment for said material; and that afterwards, and before the expiration of one year from the filing of said notice, said lien was foreclosed, all necessary parties being made parties to said proceedings, and the property sold on decree of foreclosure, and purchased by said lumber company for the amount of its judgment. The prayer of the cross-complaint was, that, upon final hearing, the court "declare and decree the lien so held by this cross-complainant as aforesaid, senior to the lien of plaintiff's mortgage set out in the complaint, and for all proper relief."

There is no controversy as to the facts of the case. The cross-complainant's mechanic's lien was confessedly prior and senior to the lien of appellee's mortgage. The question for decision, as said by counsel for appellee, is "as to the relative rights of the mortgagee and the holder of the title or interest gotten by virtue of the foreclosure of a mechanic's lien on the mortgaged property in suit, brought within the year allowed by law, but without making the mortgagee a party."



*State, ex rel., v. Harris.*

This exact question was decided against the contention of appellants, in *Deming-Colborn Lumber Co. v. Union, etc., Assn.*, 151 Ind. 468. On the authority of the case cited, the judgment in this case is therefore affirmed.

## THE STATE, EX REL. McMULLEN, v. HARRIS.

[No. 18,521. Filed December 16, 1898.]

From the Ohio Circuit Court. *Affirmed.*

*Harry R. McMullen, Rodman L. Davis, John B. Coles and George B. Hall*, for appellant.

*Joshua M. Spencer, G. M. Roberts, and C. W. Stapp*, for appellee.

JORDAN, J.—This action was instituted by the State upon information filed on the relation of Harry R. McMullen, prosecuting attorney for the seventh judicial circuit, of which the county of Ohio forms a part, for the purpose of ousting the appellee from the office of treasurer of that county. A demurrer was sustained to the information for insufficiency of facts, and the court gave judgment in favor of appellee, from which the State appeals and assigns that the court below erred in sustaining the demurrer to the information.

The question sought to be presented involves the validity of the act of the legislature approved March 2, 1897, which fixes the beginning of the terms of county treasurers in each county in this State. Acts 1897, p. 288. The facts in this case appear to be as follows: Appellee, Harris, was elected treasurer of Ohio county at the general election of 1894, for a term of two years ending August 10, 1897, and was serving his first term under said election. At the November election in 1896, one William H. Elliott was elected his successor and on the 10th day of August, 1897, he duly qualified, as provided by law, and, on the day following, demanded the office of appellee, which the latter refused to surrender on the ground that the former's term did not begin until January 1, 1898, as provided by the statute in question. The constitutional validity of the act of 1897 and the right of appellee to hold over, under the provisions of the Constitution, until January 1, 1898, was sustained by the lower court in its ruling on the demurrer, and under the authority of the decision of this court in the appeal of *Scott v. State, ex rel.*, 151 Ind. 556, this holding is correct and the judgment must be affirmed. Judgment affirmed.

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152	484
153	506
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Myers v. Cullum.

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## MYERS ET AL. v. CULLUM.

[No. 18,489. Filed Nov. 22, 1898. Rehearing denied Feb. 21, 1899.]

From the Carroll Circuit Court. *Affirmed.**L. D. Boyd, J. C. Moore and O. H. Carson, for appellants.**W. C. Smith and G. W. Julien, for appellee.*

MONKES, J.—Appellee brought this action to recover the possession of 100 acres of real estate in Carroll county, and for damages, and recovered judgment for possession. It appears from the record that William Cullum and Annie Cullum, his wife, the parents of appellee and the grandparents of the appellant Alvin W. Cullum, executed a deed conveying the 100 acres of real estate in controversy to said Alvin W. Cullum, the son of appellee, with the following provision immediately following the description of the real estate in said deed: "This deed being made to Alvin W. Cullum, son of Robert W. Cullum, the said Robert W. Cullum is to have his support off of said described land during his natural life." The contention in this cause is as to the proper construction of said clause in the deed. If said deed conveyed to appellee a life estate the judgment of the court below ought to be affirmed, otherwise it is to be reversed.

In *Stout v. Dunning*, 72 Ind. 343, the following provision was contained in a deed immediately following the description of the real estate: "A condition in the foregoing conveyance is that the said James B. Stout is to have the privilege of a support off of said lands during his lifetime without encumbrance." And this court held that said deed conveyed to said Stout a life estate in said lands. The court said: "He could not have his support off the land without the use and occupation of it. The right to such support from the land involves the use and occupation, as, without the use and occupation, he could not derive his support from it. And it seems to us that a life estate was as effectually conveyed to him as if the deed had provided that he should have the use and occupation, or the rents and profits, of the land for life."

The provision in the deed in this case is substantially the same as that in the case of *Stout v. Dunning*, *supra*, which case was cited with approval in *Williams v. Owens*, 116 Ind. 70, 72. The use of the closing words "without encumbrance" in that case added nothing to the remainder of the clause. If said words had not been used the privilege of Stout to support off of said lands would have been the same, that is, not to be encumbered or

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State, *ex rel.*, v. Luse.

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impeded. The decision in that case did not depend upon said words, but upon the fact, as stated by the court, that "the right to such support from the land involves the use and occupation, as without the use and occupation he could not derive a support from it."

This case is ruled by said case of *Stout v. Dunning*, *supra*, and said deed therefore conveyed a life estate in the land in controversy to appellee.

The judgment is therefore affirmed.

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STATE, EX REL. LUSE, v. LUSE.

[No. 18,567. Filed April 19, 1899.]

From the Carroll Circuit Court. *Affirmed.*

*W. J. Gridley*, for appellant.

*Million & Palmer*, for appellee.

MONKS, C. J.—The only reason urged for a reversal of this cause by appellant is that the finding of the court was contrary to the evidence. The correctness of this contention cannot be determined if the evidence is not in the record. The bill of exceptions does not contain the evidence, but refers to the same as "filed herewith." It is settled that under such conditions the evidence is not in the record. *Elliott's App. Proc.*, sections 821, 822; *City of Alexandria v. Cutler*, 139 Ind. 568, and cases cited; *Garrett v. State*, 149 Ind. 264, 265.

Judgment affirmed.

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MARKLEY v. STUDABAKER ET AL.

[No. 18,533. Filed Nov. 22, 1898. Rehearing denied Jan. 12, 1899.]

From the Wells Circuit Court. *Affirmed.*

*Levi Mock, John Mock and George Mock*, for appellant.

*J. S. Dailey, A. Simmons and F. C. Dailey*, for appellees.

JORDAN, J.—This is an action to enjoin the collection of an assessment of taxes for the construction of a public ditch.

The same ditch proceedings and the same questions are involved as were in *Studabaker v. Studabaker*, *ante*, 89, and upon the authority of that decision the judgment below ought to be affirmed. Judgment affirmed.

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No. 2 Indiana, etc., Assn. v. Condon.

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NO. 2 INDIANA MUTUAL BUILDING AND LOAN ASSO-  
CIATION v. CONDON ET AL.

[No. 18,423. Filed February 23, 1899.]

From the Fulton Circuit Court. *Reversed.*

*McBride & Denny* and *Essick & Metzler*, for appellant.

*Holman & Stephenson*, for appellees.

MONKS, J.—The questions in this case are the same as those decided in *Indiana Mut., etc., Assn. v. Plank, ante*, 197, and upon the authority of that case this case is reversed, with instructions to overrule the demurrer to the complaint.

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**ABATEMENT**—The question, as to whether an action should abate because the complaint shows another action for the same cause pending between the parties, is not raised by a demurrer for want of facts. See **PLEADING**, 18; *Basye v. Basye*, 172.

In the absence of statutory enactments, actions for injuries to the person abate on the death of the person injured.

*Hilliker v. Citizens Street R. Co.*, 86.

**ACCOUNT**—Sufficiency of complaint in action on, see **PLEADING**, 8; *Gise v. Cook*, 75.

## **ACTION—**

*Personal Injuries.*—*Death by Wrongful Act.*—*Personal Representatives.*—Section 285 Burns 1894 creates a new and independent right of action in favor of the personal representatives of a person whose death was caused by the wrongful act of another, and does not confer on the personal representatives the same right or cause of action that would have vested in the deceased in his lifetime for the same act or omission.

*Pittsburgh, etc., R. Co. v. Hosea*, 412

**ADVERSE POSSESSION**—See **BOUNDARIES**. Declaration of grantor made at time of sale of real estate as to the boundaries thereof, see **EVIDENCE**, 2; *Burr v. Smith*, 469.

## *Erection and Maintenance of Telegraph Line by Railroad Company.*

—The erection of a line of telegraph poles, and the maintenance and use of a telegraph line along the same by a railroad corporation, in the absence of other evidence of the intention of the railroad company to appropriate the strip of land between the telegraph poles and the right of way of the company, are not sufficient to authorize the conclusion that the interjacent strip of land has been appropriated by the railroad corporation, so as to give the corporation title thereto after twenty years.

*Pittsburgh, etc., R. Co. v. Beck*, 421.

**AMICUS CURIAE**—Cause will not be transferred to Supreme Court at instance of, see **SUPREME COURT**; *Boyd v. Brazil Block Coal Co.*, 543.

**APPEAL AND ERROR**—When appeal will not suspend the operation of the judgment, see **ATTACHMENT**, 1; *Waring v. Fletcher*, 620.

When complaint cannot be questioned for first time on appeal, see **PLEADING**, 10; *Kenner v. Whitelock, Rec.*, 635.

When joint motion for a new trial is not reviewable on appeal, see **NEW TRIAL**, 4; *Prescott v. Haughey*, 517.

The sufficiency of an indictment cannot be questioned for the first time on appeal. See **CRIMINAL LAW**, 1; *Pace v. State*, 343.

The affidavit of one jointly indicted with appellant is not competent evidence on appeal to show that such person did not demand a

**APPEAL AND ERROR—Continued.**

separate trial, where such affidavit was not part of the bill of exceptions. See **CRIMINAL LAW**, 15; *Jones v. State*, 318.

When the action of the court in permitting the filing of an additional paragraph of reply after issues were closed, contrary to a rule of the court, is not reversible error. See **COURTS**, 3; *Magnumson v. Billings*, 177.

The word "protest" is not equivalent to the word "except" as used in reserving an exception to a ruling of the court. See **WORDS AND PHRASES**; *Robinson v. State*, 304.

When acceptance by partner of benefits accrued under decree of court in a receivership amounts to a waiver of right of appeal from appointment of receiver, see *Williams v. Richards*, 523.

As to weighing the evidence by Supreme Court in a criminal cause, see **CRIMINAL LAW**, 12; *Ellis v. State*, 326.

The correctness of the conclusions of law upon the facts found can only be presented by exceptions to each conclusion, and assigning as error such conclusion. *Nelson v. Cottingham*, 135.

When constitutionality of statute is properly presented, see **APPELLATE COURT**, 1, 2; *Lewis v. Albertson*, 693.

The presumptions indulged in favor of the action of the trial court extend as well to the giving of instructions as to any other proceedings. See *Hamilton v. Love*, 641.

1. *Law of Case*.—All questions presented by the record and decided by the Supreme Court become the law of the case from that time forward, whether such questions arise each time in the same manner or not. *Brunson v. Henry*, 310.
2. *Law of Case*.—A decision of the Supreme Court that a complaint is sufficient is conclusive upon all questions relating to such pleading in a subsequent appeal. *Hatfield v. Cummings, Rec.*, 537.
3. *Record*.—An assignment that the court erred in overruling a demurrer to an answer is not available where the demurrer is not copied in the record. *Zimmerman v. Gaumer*, 552.
4. *Assignment of Error*.—Where appellant assigned the action of the court in overruling separate demurrers to two paragraphs of complaint, "that the court erred in overruling appellant's demurrer to appellee's complaint," the complaint will be considered as assailed as an entirety, and both paragraphs must be shown to be insufficient to render the assignment available. *Illinois, etc., R. Co. v. Cheek*, 663.
5. *Assignment of Error*.—*Motion to Modify Special Finding*.—An assignment of error that the court overruled appellant's motion to modify its special finding of facts will not be considered, where the record does not show that such motion was filed. *Windfall Nat. Gas, etc., Co. v. Terwilliger*, 364.
6. *Evidence*.—*Admission*.—*Exception*.—No question is presented on appeal as to the action of the court in sustaining an objection to a question propounded to a witness by merely reserving an exception to such ruling. *LaPlante v. State, ex rel.*, 80.
7. *Exception*.—*Judgment*.—An assignment that the court erred in rendering judgment in favor of a party who had neither complaint nor cross-complaint upon which to base the judgment presents no

**APPEAL AND ERROR—Continued.**

question on appeal where no objection or exception was made to the rendition thereof in the court below.

*Allen v. Studebaker Bros. Mfg. Co.*, 406.

8. *Joint Assignment*.—A ruling not available as to all the parties complaining of it cannot be successfully assigned as error jointly by them. *Hatfield v. Cummings, Rec.*, 280.

9. *Special Finding*.—*Joint Assignment of Error*.—Where an exception is made jointly to two or more conclusions of law, the exception must fail if any one of the conclusions is correct.

*Kline v. Board, etc.*, 321.

10. *Instructions*.—*Joint Assignment*.—*New Trial*.—An assignment as cause for new trial that the court erred in giving of its own motion a certain instruction, and in refusing to give certain instructions requested by appellant, must fail, where the assignment was joint, and the appellant's brief contained no argument as to error in refusing to give instructions asked.

*Consolidated Stone Co. v. Summit*, 297.

11. *Record*.—*Demurrer*.—Where the order-book entry showing the filing of the demurrer to an alternative writ of mandate recites that the "defendants jointly and severally demur to said alternative writ," and the demurrer filed was treated by the court and the parties as the joint and several demurrer of all the defendants, the demurrer will be considered on appeal, as the joint and several demurrer of all the defendants, though in the demurrer the word "defendant" was used instead of "defendants."

*State, ex rel., v. Workmen's, etc., Assn.*, 278.

12. *Bill of Exceptions*.—*Evidence*.—*New Trial*.—Where the bill of exceptions affirmatively shows that all the evidence given is not set forth therein, the Supreme Court cannot consider causes assigned for a new trial requiring a consideration of all of the evidence, although the bill of exceptions recites at the proper place "and this was all the evidence given in this cause."

*Thorne v. Indianapolis Abattoir Co.*, 317.

13. *Bill of Exceptions*.—Where the bill of exceptions was presented to the court within the time allowed it is properly in the record, although it was not finally approved nor filed until after the prescribed time.

*Robinson v. State*, 304.

14. *Bill of Exceptions*.—The certificate of the judge that the bill of exceptions was presented to him on a certain date for signature, will control a journal entry recited in the record that the bill was presented on a later date.

*Ib.*

15. *Bill of Exceptions in Criminal Prosecution*.—Under section 1847, R. S. 1881, requiring all bills of exceptions in a criminal prosecution to be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days, if a bill of exceptions is not presented within the term at which the trial was had, the record must affirmatively show that time beyond the close of the term was granted.

*Robards v. State*, 294.

16. *Bill of Exceptions*.—The record must affirmatively show that a bill of exceptions was signed by the trial judge before it was filed with the clerk.

*Windfall Nat. Gas., etc., Co. v. Terwilliger*, 364.

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17. *Record.*—The action of the court in sustaining a demurrer to a complaint cannot be reviewed on appeal where the complaint is not in the record. *Zimmerman v. Gaumer, 552; White v. Fatout, 126.*
18. *Record.—Instructions.*—Instructions made part of the record by order of court and fully set out in the order are properly in the record on appeal. *Pennsylvania Co. v. Ebaugh, 551.*
19. *Conclusions of Law.—Joint Exception.*—An exception taken by all of the defendants, jointly, to all of the conclusions of law, is not available on appeal unless it is well taken as to all of the defendants, nor unless all of the conclusions are erroneous. *Hatfield v. Cummings, Rec., 557.*
20. *Record.—Amended Complaint.—Waiver.*—Exception to ruling of court in sustaining demurrer to complaint is waived by filing amended complaint. *Zimmerman v. Gaumer, 552.*
21. *Record.—Instructions.*—Instructions which are not made part of the record by bill of exceptions, nor under the provisions of section 544 Burns 1894, are not subject to review on appeal. *Illinois, etc., R. Co. v. Cheek, 663.*
22. *Exclusion of Evidence.—Exceptions.—How Saved.*—In order to present any question on appeal as to the action of the court in excluding evidence, the record must clearly show that the witness was asked a pertinent question, and, upon objections being interposed, that a statement was made by the party offering the evidence as to what was proposed to be proved by the witness in answer to the question. *Id.*
23. *Record.—Evidence.*—The evidence cannot be considered on appeal where there is nothing in the transcript or certificate of the clerk to show that what purports to be the manuscript of the evidence embraces the evidence given at the trial. *Pace v. State, 343.*
24. *Directing Verdict.—Review.—When Evidence Is Not in Record.*—The Supreme Court will not review the action of the trial court in directing a verdict where the evidence is not in the record. *Bane v. Keefer, 544.*
25. *Evidence.—When Not All in Record.—Maps and Plats.*—Where, in the trial of a cause, maps or plats were referred to by the witnesses by way of explanation of questions asked them, for the purpose of showing the positions of certain persons and things and their movements, and such maps are not made a part of the record, the Supreme Court will not consider any questions in such appeal depending on the evidence. *Consolidated Stone Co. v. Summit, 297.*
26. *Motion to Strike Out Part of Pleading.—How Made Part of Record.*—A motion to strike out a part or all of a pleading can only be made a part of the record by bill of exceptions or order of court. *Corbey v. Rogers, 169.*
27. *Erroneous Admission of Evidence.—Harmless Error.*—Where evidence was erroneously admitted over the objection of defendant, but was immediately withdrawn by plaintiff and the jury was instructed not to consider the evidence, the error was rendered harmless. *Pittsburgh, etc., R. Co. v. Montgomery, 1.*
28. *Special Verdict.—Weight of Evidence.*—Where a special verdict is returned, and a new trial is demanded on the ground that the verdict is not sustained by sufficient evidence, such special verdict is entitled to the same presumptions in its favor as are extended to a general verdict. The Supreme Court will not weigh the evidence, nor attempt to decide a conflict in the testimony. *Pittsburgh, etc., R. Co. v. Beck, 421.*



**APPEAL AND ERROR—Continued.**

29. *Evidence.*—Where there is evidence sufficient to support the finding, the Supreme Court will not disturb the judgment upon the weight of the evidence. *Burr v. Smith, 469.*
30. *Evidence.—Special Finding.*—A special finding is entitled to the same consideration as a general finding or a verdict, and cannot be set aside on appeal if there is any evidence tending to sustain it. *Hatfield v. Cummings, Rec., 537.*
31. *Evidence.—Weight of.—Fraud.*—Where there is competent evidence, either direct or circumstantial which sustains the finding by the trial court of fraud, in the execution of a mortgage to secure creditors, the Supreme Court will not disturb the finding on the weight of the evidence. *Round v. State, 39.*
32. *Evidence not in Record.—New Trial.—Review.*—Where the reasons assigned in a motion for a new trial depend upon the evidence, and the evidence is not in the record, the ruling of the court will not be reviewed on appeal. *Bennett v. Simon, 490; Kline v. Board, etc., 321.*
33. *Parties.*—Cross-complainants are not necessary parties appellant in a vacation appeal by plaintiff from a judgment against her that she take nothing by her action, and for costs, where the cross-complainants were not parties to such judgment. *Zimmerman v. Gaumer, 552.*
34. *Granting New Trial as of Right.—Waiver.*—Where a new trial as of right is erroneously granted, a party who has duly excepted to such ruling of the court does not waive his exception by following the case through a subsequent trial. *Boyd v. Schott, 161.*
35. *New Trial as of Right.—Granting of Before Final Judgment.*—It is error to grant a new trial as of right before final judgment is entered. *Ib.*
36. *New Trial.—Misconduct of Bailiff.—Evidence.—Weight.*—Where evidence presented by affidavit in a motion for a new trial in a criminal cause on account of the misconduct of the bailiff in charge of the jury is conflicting, the weight and force is a matter for the determination of the trial court. *Messenger v. State, 227.*
37. *New Trial.*—Causes for new trial cannot be reviewed on appeal unless presented in motion for new trial and the ruling on the motion assigned as error. *Zimmerman v. Gaumer, 552.*
38. *Assignment of Error.—Failure to Discuss.*—The failure of appellant to discuss an assignment of error amounts to a waiver of the error thus assigned. *Lewis v. Albertson, 693.*
39. *Injunction.—Waiver.*—An alleged error in refusing to dissolve a restraining order is waived by putting the cause at issue and proceeding to trial on the merits. *Zimmerman v. Makepeace, 199.*
40. *Injunction.*—An appeal from a term-time interlocutory restraining order cannot be taken after the close of the term. *Ib.*
41. *Harmless Error.*—Overruling a demurrer to a bad paragraph of complaint is not available error on appeal, where it clearly appears from the record that the judgment rests upon a good paragraph. *Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*
42. *Error in Overruling Motion to Paragraph.—When Harmless.*—Error in overruling a motion to require complaint to be separated into paragraphs is not reversible unless it appears that the appellant has been deprived of some substantial right. *Pittsburgh, etc., R. Co. v. Beck, 421.*

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43. *Erroneous Instructions.—When Cause Will Not be Reversed on Account of.*—The Supreme Court will not reverse a judgment on account of erroneous instructions, where the evidence clearly establishes that appellant was guilty of the wrong imputed to him under the complaint. *La Plante v. State, ex rei., 80.*
44. *Special Verdict.—When Party Cannot be Heard to Complain of Answer to Interrogatory.*—A party cannot be heard to complain of an answer which is directly responsive to a question submitted by him in a special verdict. *Pittsburgh, etc., R. Co. v. Beck, 421.*
45. *Special Verdict.—Practice.*—Available error cannot be predicated as to the ruling of the court upon plaintiff's objection to defendant's request for a special verdict, where the objection was only to "the filing of the defendant's request for a special verdict," and no demand was made by plaintiff for a general verdict, either before the introduction of evidence, or afterwards, and no objection was made to the special verdict after the return thereof, and no motion was made for a *venire de novo*.  
*Udell v. Citizens Street R. Co., 507.*
46. *Special Verdict.—Improper Interrogatory.—Harmless Error.*—Where a question and the answer thereto in a special verdict are improper, the error, if any, is harmless if the verdict is sufficient regardless of such question and answer.  
*Pittsburgh, etc., R. Co. v. Beck, 421.*
47. *Directing Verdict.—New Trial.*—An alleged error of the court in directing a verdict must be presented by motion for a new trial and error assigned in this court on such ruling. *Bane v. Keefer, 544.*
48. *Motion for Judgment on Answers to Interrogatories.*—The Supreme Court cannot look to the evidence in considering an alleged error of the trial court in overruling a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, but only to the pleadings, the verdict, and the answers to the interrogatories. *Consolidated Stone Co. v. Summit, 297.*
49. *Venire De Novo.—Exception*—Error in overruling a motion for a *venire de novo* is not available on appeal, where no exception was reserved to such ruling. *Zimmerman v. Gaumer, 552.*
50. *Excessive Damages.*—Where appellant challenged the damages assessed by an assignment in a motion for a new trial that the damages were excessive the Supreme Court will look to the evidence, and not to the special verdict, to determine such question.  
*Illinois, etc., R. Co. v. Cheek, 663.*
51. *Excessive Damages.*—The mere fact that damages assessed may appear to the Supreme Court to be excessive will not alone justify it in disturbing the judgment, unless the assessment is so large as to induce the belief that the jury was actuated by prejudice, partiality or corruption. *Id.*
52. *Record.—Misconduct of Jury.*—Alleged misconduct of the jury cannot be reviewed on appeal, where the affidavits filed upon the trial of that issue have not been brought into the record by a bill of exceptions. *Id.*
53. *When Cannot Be Aided by Verdict.*—Where a pleading has been tested by demurrer, it cannot be aided by the findings of the special verdict, but must stand or fall by its own averments.  
*Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*
54. *Bond.—Attachment and Garnishment.*—That part of section 650 Burns 1894 relating to damages in an "appeal taken from a judg-

**APPEAL AND ERROR—Continued.**

ment for the recovery of real property or the possession thereof" or for "the recovery or return of personal property" has no application to an appeal from a judgment in a proceeding in attachment and garnishment.  
*Waring v. Fletcher, 620.*

55. *Estoppel.—Acceptance of Benefits.*—A party may not accept a benefit based on the legality of an adjudication, and thereafter maintain an appeal therefrom on the ground that it is erroneous.  
*Williams v. Richards, 528.*

56. *Rehearing.*—The fact that the Clerk of the Supreme Court may have expressed an opinion as to when a case would be decided, or that the parties were negotiating as to a compromise of the cause, is no excuse for a failure to make application for time to file additional briefs, and for an oral argument before the decision of the cause.  
*Rownd v. State, 39.*

57. *Rehearing.*—A rehearing will not be granted in order that either party may file additional briefs or request an oral argument; requests for time to file additional briefs and for an oral argument must be seasonably made.  
*Ib.*

**APPELLATE COURT**—Cause will not be transferred from Appellate to Supreme Court at instance of *amicus curiae*. See SUPREME COURT; *Boyd v. Brazil Block Coal Co., 543.*

1. *Jurisdiction.—Constitutional Law.—Appeal and Error.*—Although the condition of the record and the assignment of error are such as to present the question of the constitutionality of a statute, if the brief of the party is such as not to present it the question is not duly presented within the meaning of section 1336 Burns 1894, providing that "the Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute, federal or state, is in question, and such question is duly presented."  
*Lewis v. Albertson, 693.*

2. *Jurisdiction.—Transfer of Cause from Supreme to Appellate Court.*—Where by reason of the failure of appellant to discuss in his brief an assignment of error involving the constitutionality of a statute, such question is waived and the case thereby comes within the jurisdiction of the Appellate Court, the cause will be transferred to the Appellate Court with the assignment of error waived as completely as if the assignment was not in the transcript at all.  
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**ASSAULT AND BATTERY**—See CRIMINAL LAW.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—**

*Mortgages.*—A mortgage executed by an insolvent corporation on lands of this State to secure preferred creditors is not a part of a deed of assignment made by mortgagor, where the deed of assignment was declared invalid as to the mortgaged property.  
*Nathan, Ex., v. Lee., Rec., 232.*

**ASSIGNMENTS**—As to assignment of judgment to one of the judgment defendants, see JUDGMENTS, 1, 2; *Zimmerman v. Gaumer, 552.*

**ASSUMPSIT—**

*Life Insurance.—Payment to Wrong Person.*—An action cannot be maintained by the beneficiary of a life insurance policy against a third person to whom the amount due on the policy was paid, for the recovery of the amount paid, where it is not shown that defendant assumed to act for plaintiff in receiving the money but collected same from the company upon a claim of right under an alleged assignment of the policy by the insured.  
*Shultz v. Boyd, 166.*

**ATTACHMENT**—An undertaking in an attachment proceeding is strictly construed in favor of the obligors. See *BONDS, 1; Waring v. Fletcher, 620.*

A condition in an undertaking in attachment "duly to prosecute" not equivalent to a condition "to prosecute without delay." See *BONDS, 2; Ib.*

1. *Action on Bond.—Wrongful Appeal.—Effect of Appeal on Judgment.*—Where plaintiff obtained judgment in attachment as to part of the amount claimed, and appealed from the disallowance of the full amount, filing an ordinary appeal bond, such appeal will not suspend the operation of the judgment so far as it had the effect to release that part of the amount attached in excess of the judgment, and the attachment defendant is not entitled to recover on the attachment undertaking for the use of the amount attached in excess of the judgment during the time the case was pending in the Supreme Court, on the ground that the appeal was wrongful and oppressive. *Waring v. Fletcher, 620.*
2. *Action on Bond.—Judgment as to Part of Amount.—Wrongful Appeal.*—An attachment defendant is not entitled to a recovery on the undertaking on the ground that an appeal to the Supreme Court by the attachment plaintiff was wrongful and oppressive, where plaintiff obtained judgment in attachment as to part of the amount claimed, and appealed from the disallowance of the full amount, and the judgment as to the partial allowance was sustained. *Ib.*
3. *Action on Bond.—Where Proceeding Was Wrongful and Oppressive in Part.*—The obligors in an undertaking in an attachment proceeding are not liable thereon, where the proceeding was wrongful and oppressive in part. *Ib.*
4. *Failure to File New Bond with Amended Complaint.*—The failure of plaintiff to file a new undertaking in an attachment proceeding upon filing an amended complaint introducing a new cause of action cannot be questioned in an action on the bond after final judgment sustaining such new cause of action. *Ib.*
5. *Failure to Sustain Proceedings.—Action on Bond.*—Where the plaintiff fails to sustain his proceedings in attachment he is concluded from saying that such proceedings were not wrongful and oppressive, although he recovered judgment in the main action. *Ib.*
6. *Affidavit.—Proof.*—The grounds for attachment set forth in the affidavit in attachment are not taken as conclusive against the attachment defendant, but the same may be put in issue, and, to sustain the attachment proceedings, must be established by a preponderance of the evidence. *Ib.*

**ATTORNEY AND CLIENT**—Judgment taken by agreement of attorney acting without authority will be vacated. See *JUDGMENTS, 6; In re Application of Coffin, 439.*

**Attorney's Fees.**—Where an attorney is employed to collect a note containing an agreement for the payment of attorney's fees, the fees when recovered belong to the client, and the client must pay the attorney whatever fees have been agreed upon between them, or in the absence of an agreement such fees as are just and reasonable. *Kenner v. Whitelock, Rec., 655.*

**BASEBALL**—As to constitutionality of section 2087 Burns 1894, prohibiting the playing of baseball on Sunday, see CONSTITUTIONAL LAW, 12; *State v. Hogreiver*, 652.

**BILLS AND NOTES**—See PRINCIPAL AND SURETY.

Note executed by husband and wife for money loaned the wife and used by husband, see HUSBAND AND WIFE, 3; *Lackey v. Boruff*, 371.

*Consideration.—Mortgages.*—The consideration sustaining a note is sufficient to sustain a mortgage securing the same which was executed contemporaneously with the note, and as a part of the same transaction. *Ib.*

**BONDS**—In attachment proceeding, see APPEAL AND ERROR, 54; *Waring v. Fletcher*, 620.

Action on in attachment proceeding, see ATTACHMENT, 2, 3, 4, 5; *Ib.*

Issued by city for expenses incurred in the removal of county seat, see MUNICIPAL CORPORATIONS, 9; *Schneck v. City of Jeffersonville*, 204.

In the absence of constitutional restrictions the legislature has the right to legalize municipal bonds so long as vested rights have not intervened. See CONSTITUTIONAL LAW, 2; *Ib.*

1. *Attachment and Garnishment.—Construction.*—An undertaking in an attachment proceeding containing all the provisions required by statute is to be strictly construed in favor of the obligors the same as a bond containing such provisions would be in the absence of section 1235 Burns 1894 providing that a defective bond is to be read, construed, and enforced the same as if it contained all the conditions and provisions required by the statute.

*Waring v. Fletcher*, 620.

2. *Attachment and Garnishment.—Construction.*—A condition in an undertaking in attachment to duly prosecute the proceedings in attachment, is simply a condition to prosecute the attachment proceedings to a final judgment, and is not the same as a condition to prosecute without delay, or diligently to prosecute. *Ib.*

**BOUNDARIES**—

1. *Establishment.—Injunction.—Complaint.*—Plaintiff brought suit to enjoin an adjoining landowner from entering upon her lands and appropriating to his own use a certain strip of land. The complaint alleged that plaintiff was the owner of a certain described tract of land, and that adjoining same on the east was the land owned by defendant; that the respective owners thereof had agreed upon a line dividing such tracts, and constructed a partition fence thereon more than twenty years before the commencement of the action, which had ever since been recognized as the true line, and that defendant had wrongfully entered upon plaintiff's land at a point ten feet west of said line for the purpose of locating a partition fence. *Held*, that the complaint sufficiently alleged that plaintiff was the owner of the land to the partition fence.

*Burr v. Smith*, 469.

2. *Adverse Possession.—Pleading.*—A complaint in an action to enjoin an adjoining landowner from encroaching upon the lands of plaintiff, which discloses a continued, notorious, exclusive and adverse occupancy of the land by plaintiff and grantors for a period

**BOUNDARIES—Continued.**

of over twenty years, is not bad for failure to allege that the occupancy was under claim or color of title. *Ib.*

3. *Landowner Does Not Waive Rights Under Previous Survey by a Demand for New Survey.*—A demand for a survey, or the consent of the owner of lands that a survey may be made is not an admission that the location of a corner or line is uncertain, or that they have been incorrectly located by a previous survey; nor is it a waiver of any right such owner has under a previous survey.

*Williams v. Atkinson, 98.*

4. *Surveys.—Estoppel.*—The owner of land who causes a survey to be made according to law, or consents thereto, loses none of his rights by such survey, and is not estopped from claiming title to his land, notwithstanding such survey remains unappealed from, as an official survey is *prima facie* evidence in favor of the corners so established and the lines so run, and nothing more. *Spacy v. Evans, 431.*

5. *Agreement of Landowners that New Survey be Made.*—An agreement between adjoining landowners that a survey be made does not justify the surveyor in changing a corner or line lawfully established by previous survey.

*Williams v. Atkinson, 98.*

6. *Surveyor's Record.—Notice of Survey.—Presumption.*—Where the record of a county surveyor fails to show that the required notice was given to the owners of land adjoining a line sought to be established, it will not be presumed that notice was given, since it is no part of the surveyor's duty to give such notice. *Ib.*

7. *Surveyor's Record.—Evidence.*—A surveyor's record, reciting that the parties were present and consenting to the survey without naming them, and without disclosing that such parties had consented in writing, or had been duly notified of the survey, is not admissible in evidence to prove the location of certain corners. *Ib.*

8. *Statutory Survey.—Evidence.*—A letter to the owner of land adjoining a line sought to be established from a former owner of such land, stating that no private survey would be recognized and warning him to keep off the land until a legal survey should be made, is not admissible in evidence to prove the location of the line in dispute. *Ib.*

9. *Statutory Survey.—Evidence.*—A contract between the owner of land adjoining a line sought to be established and a former owner of the land, which contract mentions the quantity of land such owner was to get, but contains nothing as to the location of the disputed line, is not admissible in evidence to prove the location of such line. *Ib.*

**BUILDING AND LOAN ASSOCIATIONS**—As to taxation of, see **TAXATION**, 7, 8; *State, ex. rel., v. Workingmen's, etc., Assn., 278.*

A suit by a building and loan association to foreclose a mortgage and enforce a lien on the shares of stock assigned as collateral security is not an action on the certificate of stock. See **PLEADING**, 28; *Indiana Mut. Building, etc., Assn. v. Plank, 197.*

Any law either directly or indirectly exempting building and loan associations from taxation is unconstitutional. See **CONSTITUTIONAL LAW**, 1; *State, ex. rel., v. Workingmen's, etc., Assn., 278.*

**Items Charged Borrowing Members.**—A building and loan association is only authorized by law to charge its borrowing members

**BUILDING AND LOAN ASSOCIATIONS—Continued.**

with dues, assessments and fines, and premium and interest on loans, and cannot charge interest on dues, assessments and fines.  
*Kenner v. Whitelock, Rec., 635.*

**CARRIERS—See RAILROADS.**

1. *Damages by Fire.—Exemption.—Negligence.*—A special contract exempting a carrier from liability for loss or damage caused by fire is valid, but such exemption does not protect the carrier when the fire or the consequent loss is the result of his own negligence.  
*Insurance Co. v. Lake Erie, etc., R. Co., 333.*
2. *Damages by Fire.—Exemption.—Negligence.—Burden of Proof.*—In an action against a carrier for the loss of goods by fire the burden is upon plaintiff to show that the loss was the result of the negligence of the carrier, where by the terms of the bill of lading the carrier was exempted from liability for losses caused by fire. *Ib.*

**CHATTEL MORTGAGES—See MORTGAGES.**

1. *Foreclosure.—Complaint.—Allegation as to Payment.*—An averment in a complaint to foreclose a chattel mortgage upon property in the hands of a purchaser thereof, that plaintiff holds a lien on the mortgaged chattels by virtue of her mortgage, and that the interest in the property held by the defendant is inferior and junior to her said lien, inferentially shows that the mortgage debt was unpaid at the time of the commencement of the action, and is sufficient to put defendant upon his answer. *Baldwin v. Boyce, 46.*
2. *Foreclosure.—Complaint.—Record of Mortgage.*—An allegation in a complaint to foreclose a chattel mortgage that the mortgage was recorded in a certain county within ten days after its execution, and a copy of the mortgage, made a part of the complaint by exhibit, disclosing that the mortgagor resided in such county at the time she executed the mortgage, sufficiently show that the mortgage was recorded in the county in which the mortgagor resided. *Ib.*
3. *Foreclosure.—Complaint.—Maturity of Debt.*—The omission in a complaint to foreclose a chattel mortgage of an averment as to the maturity of the debt is supplied by a copy of the mortgage filed therewith showing that the note secured had fully matured before the action was instituted, and such infirmity in the pleading is thereby cured. *Ib.*
4. *Description of Property.—Location.—Enforcement Against Purchaser of Mortgaged Chattels.*—The description of property in a chattel mortgage as located at a certain street and number, omitting the name of the city and county, is sufficiently definite to authorize the enforcement of the lien against the property in the hands of a purchaser thereof, where the mortgage disclosed that the mortgagor was a resident of a certain county; that the mortgage note was made payable at a bank in the county seat of such county; the mortgage acknowledged and recorded in such county; and that the mortgaged property was in the possession of the mortgagor and that she was to retain the possession of the mortgaged property until the maturity of the note secured. *Ib.*
5. *Description.—Identification of Property.—Parol Evidence.*—Parol evidence is admissible for the purpose of aiding the description in the mortgage in the identification of the mortgaged property. *Ib.*

**CITIES—See MUNICIPAL CORPORATIONS; TOWNS.**

Riding a bicycle on the sidewalk of a city is a public offense. See  
**HIGHWAYS, 9; Town of Whiting v. Doob, 157.**

**COLLATERAL ATTACK**—Of the order of a board of county commissioners in the annexation of territory to a town, see **TOWNS**, 1, 4; *Hiatt v. Town of Darlington*, 570.

**COMPLAINT**—See **PLEADING**.

In action on account, see **PLEADING**, 8; *Gise v. Cook*, 75.

In action to recover penalty for failure to list property for taxation, see **TAXATION**, 2, 4; *La Plante v. State, ex rel.*, 80.

In an action for damages on account of injuries sustained by passenger in attempting to enter car where no platform was provided, see **CONTRIBUTORY NEGLIGENCE**, 2; *Illinois, etc., R. Co. v. Cheek*, 663.

For damages for wrongful appropriation of real estate, see **PLEADING**, 7; *Pittsburgh, etc., R. Co. v. Beck*, 421.

Sufficiency of in an action to foreclose chattel mortgage, see **CHATTEL MORTGAGES**, 1, 2, 3, 4; *Baldwin v. Boyce*, 46.

Sufficiency of in an action to enjoin an adjoining landowner from encroaching upon the lands of plaintiff, see **BOUNDARIES**, 2; *Burr v. Smith*, 469.

To enjoin the construction of a free macadamized road, see **HIGHWAYS**, 8; *Layman v. Hughes*, 484.

**Personal Injuries**.—*Description of Injuries*.—*Motion to Make More Specific*.—A complaint against a railroad company for damages, alleging that plaintiff, while attempting to enter a passenger car, sustained severe and permanent injuries, described as the displacement of the right ovary, and the rupture of the organs of the "pelvic and ileocolic and right inguinal region, and the straining of the right fallopian tube, and a disarrangement of the uterus," etc., is not so vague and uncertain in the description of the injuries sustained as to be subject to a motion to make more specific. *Illinois, etc., R. Co. v. Cheek*, 663.

**CONSTITUTIONAL LAW**—When constitutionality of statute is not duly presented, see **APPELLATE COURT**, 1, 2; *Lewis v. Albertson*, 693.

The rule that a penal statute will be strictly construed does not apply in determining the constitutionality thereof. *State v. Hogreiver*, 652.

The act of March 11, 1895, amending the practice act, and providing for special verdicts, sufficiently expresses the subject in the title. See **STATUTES**, 2; *Udell v. Citizens Street R. Co.*, 507.

The act of March 11, 1895, amending the practice act and providing for special verdicts, is not unconstitutional. See **SPECIAL VERDICT** 1.; *Udell v. Citizens Street R. Co.*, 507.

Where several different acts are prohibited by law, a difference in the penalties for violation of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. See **CRIMINAL LAW**, 28; *State v. Hogreiver*, 652.



**CONSTITUTIONAL LAW—Continued.**

1. *Exempting Building and Loan Stock from Taxation.*—Any law \_either directly or indirectly exempting stock in building and loan associations from taxation is unconstitutional.  
*State, ex. rel., v. Workingmen's, etc., Assn., 278.*
2. *Legalizing Act.—Municipal Bonds.*—In the absence of constitutional restrictions the legislature has the right to legalize the bonds of a city so long as vested rights have not intervened.  
*Schneck v. City of Jeffersonville, 204.*
3. *Legalizing Act.—Exercise of Judicial Power by Legislature.*—Where certain bonds have been judicially declared to be invalid, an act legalizing such bonds is not an attempt of the legislature to exercise judicial power in violation of section 1, article 7, of the Constitution, as respects an action involving the validity of such bonds commenced after the passage of the legalizing act. *Ib.*
4. *Act Legalizing Jeffersonville City Bonds.*—The act of March 2, 1897, legalizing certain bonds of the city of Jeffersonville did not create a debt of the city greater than two per cent. of the valuation of the property therein, in violation of section 1, article 18, of the Constitution as amended March 14, 1881, but simply legalized the debt which the legislature recognized as having existed before the Constitution was thus amended. *Ib.*
5. *Act Legalizing City Bonds Not Local and Special Legislation.*—An act legalizing city bonds is not unconstitutional as being local and special legislation, since such legislation does not fall within the cases enumerated by section 22, article 4, of the Constitution. *Ib.*
6. *Railroads.—Employers' Liability Act.*—The act of March 4, 1893, sections 7083-7087 Burns 1894, known as the Employers' Liability Act, making railroad and other corporations, except municipal corporations, liable for injuries to employes resulting from negligence of co-employes, and prohibiting such corporations from entering into contracts with employes releasing them from liability to any employe having a right of action under the provisions of said act is constitutional.  
*Pittsburgh, etc., R. Co. v. Hosea, 412.*
7. *Railroad.—Employers' Liability Act.*—The Employers' Liability Act (Acts 1893, p. 294), making railroad and other corporations, except municipal corporations, liable for injuries to their employes resulting from negligence of co-employes, does not deny railroad corporations the equal protection of the laws guaranteed by section 23, article 1, of the Constitution of the State and the fourteenth amendment to the Constitution of the United States.  
*Pittsburgh, etc., R. Co. v. Montgomery, 1.*
8. *Title to Act.—Employers's Liability Act.*—Under section 19, article 4, of the State Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, the act of March 4, 1893, entitled "an act regulating railroads and other corporations," and which enlarges the liability of railroads, is not unconstitutional. *Ib.*
9. *Employers' Liability Act.—Railroads.—Release From Future Liability.*—Section 7087 Burns 1894, which nullifies contracts made by railroad companies or other corporations, releasing them from future liability to employes for personal injuries is not unconstitutional, as being in violation of section 23, article 1, of the Constitution of the State and the fourteenth amendment to the Constitution of the United States. *Ib.*
10. *Employers' Liability Act.—Title.*—The prohibition of contracts releasing corporations from liability for personal injuries of

**CONSTITUTIONAL LAW—Continued.**

their employes, as prescribed by section 5, of the act of March 4, 1893, is germane to and properly connected with the main subject of the act, and need not be expressed in the title. *Ib.*

11. *Corporations.—Railroads.*—Where an act fixing the liability of corporations is valid as to railroad corporations, a railroad corporation cannot be permitted to litigate the constitutionality of the act as to other corporations. *Ib.*

12. *Baseball.—Sunday.*—Section 2087 Burns 1894 prohibiting any person from playing baseball on Sunday, where a fee is charged, is not class legislation within the meaning, and in violation of the fourteenth amendment of the United States Constitution providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens, nor deny to any person, within its jurisdiction the equal protection of the laws", nor of article 1, section 23, of the State Constitution providing that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." *State v. Hogreiver, 652.*

**CONTINUANCE—**

*Discretion of Court.*—No error was committed in overruling defendant's motion for a continuance upon the ground that he was not prepared to produce the evidence to refute new facts brought into the case by a paragraph of reply, filed by plaintiff after the issues were closed, and on the day of trial, where all the material facts pleaded in such reply were in issue by the general denial.

*Magnuson v. Billings, 177.*

**CONTRACTS**—Violation of contracts of hire, see MASTER AND SERVANT, 1, 2, 8, 4, 5; *Hamilton v. Love, 641.*

Standing trees may be subject to sale by parol. See TRESPASS; *Spacy v. Evans, 431.*

A special contract exempting a carrier from liability for loss or damage caused by fire is valid, but such exemption does not protect the carrier when the fire or the consequent loss is the result of his own negligence. See CARRIERS, 1; *Insurance Co. v. Lake Erie, etc., R. Co., 333.*

1. *Execution Without Reading.*—It is a general rule that one who executes a written instrument without reading it will not be relieved of the consequences of his want of care.

*Givan v. Masterson, 127.*

2. *Execution Without Reading.—Fraud.*—One who, by known trust and confidence reposed in another, relies, and has good cause to rely, upon representations made by such other party, and is thereby induced to execute an instrument for the benefit of such other person, and in the belief that he is executing another and different instrument, may be relieved as against such wrong, in case no innocent third parties are thereby injured. *Ib.*

**CONTRIBUTORY NEGLIGENCE—SEE NEGLIGENCE.**

1. *Special Verdict.—Conclusion.*—Where the facts disclosed by a special verdict are such as would warrant reasonable men in drawing two inferences as to the contributory negligence in favor of the plaintiff, such inference will be accepted by the court as conclusive.

*Illinois, etc., R. Co. v. Cheek, 663.*

**CONTRIBUTORY NEGLIGENCE—Continued.**

2. *Damages.—Railroads.—Complaint.*—A complaint against a railroad company for damages on account of injuries sustained by plaintiff in attempting to enter defendant's passenger car, alleged that defendant neglected to construct a platform at its station where plaintiff took passage; that defendant stopped its train at a place where the distance from the ground to the lowest step on the car was three feet, and invited the plaintiff to board the car in such position without furnishing a stool to assist her in reaching the steps; that plaintiff requested that a stool be furnished for such purpose, but the servants in charge of the train assured her that they would assist her to board the train in safety, and in making an effort to enter the car without any fault or negligence on her part she was injured. *Held*, that the complaint does not show as a matter of law that plaintiff was guilty of contributory negligence.

*Ib.*

**CORPORATIONS**—Where an act fixing the liability of corporations is valid as to railroad corporations, a railroad corporation cannot be permitted to litigate the constitutionality of the act as to other corporations. See **CONSTITUTIONAL LAW**, 11; *Pittsburgh, etc., R. Co. v. Montgomery*, 1.

1. *Officers.—Services Outside Official Duties.—Compensation.*—The claim of an officer of a corporation for services rendered by him beyond the scope of his official duty may be allowed, where no element of fraud or dishonesty is involved.

*Kenner v. Whitelock, Rec., 635.*

2. *Stockholders Bound by the Action of Court in Appointment of Receiver.*—Stockholders of a corporation, who are such pending litigation resulting in the appointment of a receiver therefor, are bound thereby.

*Hatfield v. Cummings, Rec., 280.*

3. *Mortgage to Secure Preferred Creditors.—Insolvent Foreign Corporations.*—An insolvent foreign corporation may mortgage its lands in this State to secure a *bona fide* antecedent debt to a preferred creditor, where such action is not prohibited by the statutes of the foreign state.

*Nathan, Ex., v. Lee, Rec., 232.*

4. *Preference of Creditors.—Insolvency.*—An insolvent corporation, in like manner as an insolvent natural person, may execute a mortgage upon its property for the purpose of securing preferred creditors.

*Ib.*

5. *Foreign Corporations.*—The restrictions or prohibitions contained in the charter of a foreign corporation, or those of the governing laws of the state where it is organized, in relation thereto, are recognized and enforced in other jurisdictions, and not the general legislation or judicial decisions of the state in which such corporation is organized.

*Ib.*

6. *Railroad Corporation a Person within the Meaning of Bill of Rights.—Constitution Construed.*—Railroad corporations are persons within the meaning of section 21, article 1, of the Constitution of the State, and of the equality clause of the Constitution of the United States.

*Pittsburgh, etc., R. Co. v. Montgomery*, 1.

**COUNTIES**—Costs incident to location of county seat may be imposed upon city where located. See **MUNICIPAL CORPORATIONS**, 8, 9, 10; *Schneck v. City of Jeffersonville*, 204.

1. *Claims.—Jurisdiction of Board of Commissioners.*—The filing of a claim against a county with the auditor, and his presenting the

**COUNTIES—Continued.**

same to the board of county commissioners is all that is required to give the board jurisdiction to act thereon. *Myers v. Gibson*, 500.

2. *Claims.—Jurisdiction of Board of Commissioners.—Appeal.*—Unless the board of county commissioners has jurisdiction to act on the merits of a claim presented, the circuit court, on an appeal from an allowance by such board, will not have jurisdiction to render judgment against the county. *Ib.*
3. *Claims Refled After Disallowance.—Jurisdiction of Board of Commissioners.*—Where a claim against a county for work and material was filed with the board of commissioners, and by them disallowed, and no appeal was taken, the board at a subsequent session had no jurisdiction to allow a claim presented for the same work and material. *Ib.*

**COUNTY ASSESSOR—See TAXATION.**

May inspect books of building and loan and other corporations.

See TAXATION, 7; *State, ex. rel., v. Workingmen's, etc., Assn.*, 278.

**COUNTY SURVEYOR—See BOUNDARIES; SURVEY.**

**COUNTY TREASURER**—Construction of the act of 1897 (Acts 1897, p. 288) fixing the time for the commencement of term of office. See OFFICERS, 1, 2, 8; *Aikman v. State, ex. rel.*, 567; *Weaver v. State ex. rel.*, 479.

**COURTS—See SUPREME COURT; APPELLATE COURT.**

1. *Execution.—Injunction.*—The court of one county may restrain the illegal sale of lands in such county under an execution issued from the court of another county. *Zimmerman v. Makepeace*, 199.
2. *Rules for Conduct of Business.*—Courts have power to adopt rules for conducting the business therein, not repugnant to the laws of the State, and when adopted they have the force and effect of law, and cannot be dispensed with in a particular case. *Magnuson v. Billings*, 177.
3. *Rules for Conduct of Business.—Pleading.—Argumentative Denial.*—The action of the court in permitting plaintiff to file an additional paragraph of reply after the issues were closed, contrary to a rule of court is not reversible error, where the pleading amounted merely to an argumentative denial, and all the evidence under it was admissible under the general denial. *Ib.*
4. *Assignment for Benefit of Creditors.—Preferences.—Insolvent Corporations.—Decision of Courts of Sister State.*—A mortgage executed by an insolvent corporation of another state upon lands in this State to secure preferred creditors residing in the sister state will not be held invalid because of a decision of the supreme court of such state that an insolvent corporation cannot lawfully dispose of or encumber its property otherwise than for the equal benefit of all of its creditors, where such mortgage was not executed in violation of any statute of such state, nor in violation of any construction placed upon any statute of such state, by its highest court. *Nathan, Ex., v. Lee, Rec.*, 232.

**CRIMINAL LAW—See FORGERY.**

Time in which to present bill of exceptions, see APPEAL AND ERROR, 15; *Robards v. State*, 294.

**CRIMINAL LAW—Continued.**

- Termination of prosecution, see **MALICIOUS PROSECUTION**, 1, 2;  
*Stark v. Bindley*, 182.
- As to the giving of irrelevant instructions in a criminal cause, see  
**INSTRUCTIONS**, 10, 11, 12; *Robinson v. State*, 304.
1. *Indictment.—Appeal and Error.*—The sufficiency of an indictment cannot be questioned for the first time on appeal.  
*Pace v. State*, 343.
  2. *Affidavit.—Baseball.—Sunday.*—An affidavit in a prosecution for playing baseball on Sunday where an admittance fee is charged, in violation of section 2087 Burns 1894, is not bad for failing to state the name of some person who paid an admission fee.  
*State v. Hogleiver*, 652.
  3. *Defense.—Special Pleas.*—Such matters of defense as might have been set up by special plea at common law may yet be presented in that manner in this State.  
*Davis v. State*, 145.
  4. *Defenses Which May be Specially Plead.*—Besides the special pleas to the jurisdiction of the court and in abatement, the only defenses that may be specially pleaded are a former acquittal, a former conviction, and insanity.  
*Ib.*
  5. *Evidence.—Examination of Defendant as to Previous Offenses.*—No error was committed in permitting the prosecuting attorney to ask defendant on cross-examination concerning certain prosecutions against him for criminal offenses committed by him previous to the commission of the offense for which he was being tried.  
*Ellis v. State*, 326.
  6. *Previous Threats.—Homicide.*—Previous threats made by deceased against defendant are not admissible in evidence in the trial of a person charged with committing homicide, where it was not shown that deceased attacked defendant.  
*Ib.*
  7. *Evidence.—Previous Threats.—Homicide.*—In the trial of a case of homicide, previous threats of deceased are not admissible in evidence, where it is not shown that such threats had been communicated to defendant before the homicide.  
*Ib.*
  8. *Evidence.—Examination of Defendant as to Previous Offenses.*—Where defendant was cross-examined concerning certain prosecutions against him for criminal offenses committed previous to the offense for which he was being tried, he is not entitled to testify as to matters in excuse and extenuation of such acts.  
*Ib.*
  9. *Trial.—Presence of Accused.*—The filing by defendant of a motion for change of venue and for leave to summon witnesses to appear and testify in support thereof and the proceedings of the court on such motions are neither parts of the trial, nor incidents of it, within the meaning of the provisions of section 1855 Burns 1894, that no person prosecuted for an offense punishable by death, or confinement in the state prison or county jail shall be tried unless present during the trial.  
*Jones v. State*, 318.
  10. *Assault and Battery with Intent.—Evidence.—Opinion of Witness.*—The opinion of a witness that a revolver used in committing an alleged assault and battery with intent to commit murder would not probably kill at a given distance is inadmissible in evidence.  
*Rains v. State*, 69.
  11. *Instruction.—Good Character of Defendant.*—An instruction that, if the jury believed that the defendant was guilty as charged in the indictment, beyond a reasonable doubt, it would be their

**CRIMINAL LAW—Continued.**

- duty to convict him, though he had previously been of good reputation for peace and quietude, was not prejudicial to the defendant when given in connection with other instructions properly charging the jury upon the question of defendant's good character. *Ib.*
12. *Self-Defense.—Apprehension of Danger.—Evidence.—Weight.—Homicide.*—Where in the trial of a criminal cause the jury, by their verdict, decided that defendant had no reasonable apprehension of danger when he shot deceased, it is not the province of the Supreme Court to weigh the evidence, if that part of it tending to support the verdict is legally sufficient to justify the finding of the jury. *Ellis v. State, 326.*
13. *Evidence.—Record of the Trial and Conviction of another Charged With same offense.*—The record of the trial and conviction of another person who was indicted and separately tried for the same offense is not admissible in evidence either to prove defendant's innocence or to establish the grade of the offense. *Davis v. State, 145.*
14. *Change of Venue.—Separate Trial.*—The separate motion of one jointly indicted with another for a change of venue involves and includes a motion for a separate trial. *Jones v. State, 318.*
15. *Separate Trial.—Affidavit of One Jointly Indicted.—Appeal and Error.*—The affidavit of a person jointly indicted with appellant, is not competent evidence on appeal to show that such person did not demand a separate trial, where such affidavit was not part of the bill of exceptions. *Ib.*
16. *Assault and Battery with Intent.—Instructions.—Harmless Error.*—Erroneous instructions as to malice and other elements which enter into the crime of murder in the first and second degrees will be considered harmless, where appellant was convicted only of assault with intent to commit manslaughter. *Rains v. State, 69.*
17. *Instruction.—Reasonable Doubt.*—An instruction that the jury is not required to be satisfied beyond a reasonable doubt of "each link in the chain of evidence relied upon to establish the guilt of the defendant," when standing alone, is inaccurate and objectionable, but such instruction does not constitute reversible error when given with full, complete, and correct instructions on the subject of reasonable doubt. *Ib.*
18. *Instructions.—Self-Defense.*—An instruction to the effect that a person is not justified in using a deadly weapon in defense of his person when assaulted by one who has no weapon in his hands, nor the appearance thereof, is erroneous. *Davis v. State, 34.*
19. *Instruction.—Revenge.*—On the trial of one charged with assault with intent to commit murder an instruction which deals with the question of self-defense is not vitiated by the addition of the words, "the law does not permit a person to revenge himself in any case." *Rains v. State 69.*
20. *Instruction.—Harmless Error.*—An instruction directing the jury to assess the punishment of defendant if they found him guilty, when under the law they could determine only the question of guilt or innocence, is harmless. *Davis v. State, 145.*
21. *Misconduct of Bailiff.—Presumption.—Jury.*—It will not be presumed in the absence of evidence that an improper statement made to a juror by the bailiff was communicated by him to other members of the jury, and that it exerted such an influence over the jury as to cause them to return a verdict against defendant in a criminal cause more unfavorable to him than they otherwise would. *Messenger v. State, 227.*

**CRIMINAL LAW—Continued.**

22. *Jury.—Misconduct.—Separation.—New Trial.*—No error was committed in overruling a motion for a new trial based upon the alleged misconduct of the jury in separating after they retired from the court room, without leave, where it is shown that the separation was unavoidable; that they were not out of the custody and sight of the bailiff, and that not a word was spoken to them by any person.  
*Jones v. State, 318.*
23. *Homicide.—Self-Defense.—Apprehension of Danger.—When Question for Jury.*—The evidence showed that deceased came to the house where defendant boarded, about 10 o'clock at night, and asked to stay overnight; that defendant went to the door and informed him that it was not a lodging house, and, after consulting the landlady, went back to the door and, having some words with deceased, closed the door, when deceased threw something and struck the house about three feet from the door; that defendant went to his bedroom and got his revolver, went to the door and fired at once at deceased, who had gone outside the front gate about fifteen feet away. There was no evidence that deceased attempted to enter the house, but defendant claimed that when he opened the door deceased made a movement as if to shoot or throw at him, and, upon this appearance, he fired the fatal shot. *Held*, that it was the province of the jury to determine whether the circumstances afforded reasonable grounds for defendant to apprehend that his life was in danger, or that he was in danger of great bodily harm.  
*Ellis v. State, 326.*
24. *Indeterminate Sentence Law.—Constitutional Law.—Assault and Battery with Felonious Intent.*—The act of March 8, 1897 (Acts 1897, p. 219), known as the indeterminate sentence law, is not an *ex post facto* law within the meaning of section twenty-four, article one of the bill of rights as applied to an indeterminate sentence upon conviction of assault and battery with felonious intent, the crime having been committed before the passage of the act, as the new law does not add to or increase the punishment of the offense beyond that existing at the time of its commission.  
*Davis v. State, 34.*
25. *Indeterminate Sentence Law.—Constitutional Law.—Repeal of Good Time Law.*—The Act of March 8, 1897 (Acts 1897 p. 219), known as the indeterminate sentence law, is not *ex post facto* in that it repeals the good time law, as the good time law relates only to rules for the government of the prison officials, and the indeterminate sentence law substitutes a new and different method of crediting good time to the convict.  
*Ib.*
26. *Baseball.—Sunday.*—Section 2087 Burns 1894, prohibiting any person from playing baseball on Sunday "where any fee is charged" is not void for uncertainty as to the meaning of the word "fee", or by whom it is to be paid. *State v. Hogreiver, 652.*
27. *Penalties.—Review.*—The graduation of penalties for offenses, differing in their circumstances and surroundings is a matter wholly within the discretion of the legislature, and will not be reviewed by the courts where an abuse of discretion is not shown. *Ib.*
28. *Penalties.—Constitutional Law.*—Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens.  
*Ib.*

**CRIMINAL LAW—Continued.**

20. *Police Power.—Baseball.—Sunday.*—Section 2087 Burns 1894 prohibiting persons from playing baseball on Sunday where a fee is charged is a valid exercise of the police power of the State. *Ib.*

**DAMAGES**—See RAILROADS; CARRIERS; NEGLIGENCE; MASTER AND SERVANT; PERSONAL INJURIES.

Sufficiency of complaint in an action for the wrongful appropriation of real estate, see PLEADING, 7; *Pittsburgh, etc., R. Co. v. Beck*, 421.

As to excessive damages, see APPEAL AND ERROR, 50, 51; *Illinois, etc., R. Co. v. Cheek*, 663.

Administrator cannot recover for the physical pain and suffering of his intestate. See PERSONAL INJURIES, 2; *Hilliker v. Citizens Street R. Co.*, 86.

*Personal Injuries.—Physical and Mental Suffering.*—In an action for damages for personal injuries physical and mental suffering are proper elements of damages.

*Pittsburgh, etc., R. Co. v. Montgomery*, 1.

**DEATH**—Section 285 Burns 1894 creates a new and independent right of action in favor of the personal representatives of a person whose death was caused by the wrongful act of another. See ACTION; *Pittsburgh, etc., R. Co. v. Hosea*, 412.

**DECEDENTS' ESTATES**—See DESCENT AND DISTRIBUTION.

As to setting aside final settlement for the purpose of collecting taxes, see TAXATION, 9, 10, 11; *Graham v. Russell, Aud.*, 186.

1. *Filing of Claims.—Taxes.*—The State is not required to file for payment its claim for taxes against a decedent's estate.

*Graham v. Russell, Aud.*, 186.

2. *Action to Foreclose Mortgage.—Administration on Estate.*—In an action to foreclose a mortgage made payable to mortgagee's children and grandchildren it was not necessary to prove that the estates of such children as were deceased had been settled, where the complaint alleged that the children died intestate, leaving no debts, and that no administrator had been appointed on account of their estates.

*Brunson v. Henry*, 310.

**DEEDS**—See EASEMENTS. Are governed by the law of the *situs* of the realty. See MORTGAGES, 1; *Nathan, Ex., v. Lee, Rec.*, 232.

Reservation of right of way in deed, see EASEMENTS, 2; *Boyd v. Bloom*, 152.

Where conveyance made by husband to wife may be set aside on account of fraud of wife in abuse of confidential relations, see HUSBAND AND WIFE, 8; *Basye v. Basye*, 172.

1. *Execution Without Reading.—When Set Aside for Fraud.*—Where a stepson at the request of his stepfather signed a deed without reading, believing, as was represented by such stepfather, that he was signing a mortgage which he had just read, such deed will be set aside for fraud.

*Givan v. Masterson*, 127.

2. *Mistake.—Correction.*—Where a mistake was made in a deed, a deed of correction and confirmation relates back to the time of the original conveyance, no new rights having intervened.

*Pittsburgh, etc., R. Co. v. Beck*, 421.



**DEEDS—Continued.**

3. *Recital Reserving Life Estate.—Construction.*—A conveyance in the ordinary form, except a recital that the "deed is to take effect and be in full force on and after the death of this grantor," is a deed, and is not testamentary in character. The only effect of the recital being to reserve a life estate to the grantor, and thus postpone the possession of the grantee until after the death of the grantor.  
*Kelley, Gdn., v. Shimer, Adm., 290.*
4. *How Premises Sought to be Described May be Identified.*—For the purpose of identifying the premises sought to be described reference may be had to other conveyances, plats, lines, or records, well known in the neighborhood, or on file in public offices.  
*Pittsburgh, etc., R. Co. v. Beck, 421.*
5. *After Acquired Title.—Husband and Wife.—Mortgages.—Foreclosure.—Inchoate Interest of Wife.—Redemption.*—A grantor conveyed land giving only a certificate of purchase. The land was afterward conveyed by successive warranty deeds. The last grantee mortgaged same for the purchase money, his wife not joining therein, and the mortgage was foreclosed without making the wife a party. After the foreclosure, and pending the sale, the original grantor executed a warranty deed to the last grantor. *Held*, that such deed related back and vested the after-acquired title in grantee as of the date of his deed; that the inchoate interest of grantee's wife also attached as of that date; that the purchaser at the foreclosure sale acquired the legal title to the land, subject to the right of the wife to redeem as to her one-third interest in the manner provided by law.  
*Frain v. Burgett, 65.*
6. *Action to Set Aside for Fraud.*—Where a husband and wife join in a deed to the husband's stepfather, believing, as represented by such stepfather, that they were executing a mortgage, and an action is afterwards brought to set aside the deed, the evidence of the wife that she had reposed great trust and confidence in her husband's stepfather was admissible.  
*Given v. Masterson, 127.*
7. *Action to Set Aside for Fraud.—When Fraud May be Proved by Preponderance of Evidence.*—In an action to set aside a deed alleged to have been procured by the fraud of one in whom the grantors properly reposed trust and confidence, the fraud may be established by a preponderance of the evidence; the rule that the evidence, in order to prevail against a deed regular in form and duly acknowledged, must satisfy the court beyond a reasonable doubt that the execution of the deed was procured through the fraud of the grantee, not being applicable. *Id.*
8. *Action to Set Aside for Fraud.—Evidence.*—In an action by a stepson to set aside a deed alleged to have been procured by his stepfather by fraudulently representing at the time of its execution that it was a mortgage, where it is claimed by plaintiff that he did not know the real nature of the instrument for two months after its execution, the testimony of a witness that she had afterwards informed plaintiff of the true character of the instrument he had signed, is admissible as corroborating the evidence of plaintiff that he did not know the instrument was a deed when he signed it. *Id.*

**DEMURRER**—As to form of joint and several demurrer, see **PLEADING**, 16; *Rownd v. State, 89.*

When will be treated as a joint and several demurrer on appeal, see *State, ex. rel., v. Workmen's, etc., Assn., 278.*

**DESCENT AND DISTRIBUTION**—See DECEDENTS' ESTATES. Inchoate interest of wife in lands of husband, see HUSBAND AND WIFE, 4; *Frain v. Burgett*, 55.

1. *Husband and Wife.—Childless Second Wife.*—Section 1 of the act of March 11, 1889 (Acts 1889, p. 430, section 2644 Burns 1894) providing that if a man marry a second or subsequent wife and has by her no children, but has children alive by a former wife, the interest of such wife in the lands of her husband shall be a life estate, and the fee of the same shall vest in such children at the death of the husband is void, as it sought to amend section 2 of the act of 1853 which was repealed by the act of March 9, 1867. *Helt v. Helt*, 142.
2. *Husband and Wife.—Childless Second Wife.*—Plaintiff brought suit for partition of her one-third interest in her deceased husband's real estate. The pleadings showed that plaintiff was a second wife, having no children by the marriage existing at the time of her husband's death, but having a child living by a prior marriage between her and her husband, which had been dissolved, and that the husband had children living by a previous wife. *Held*, that the rights of plaintiff in said lands are determined by section 2487 R. S. 1881, or 2640 Burns 1894, either of which gives her one-third of the land in fee simple, with limitation as to descent and disposition thereof as provided in section 2487 R. S. 1881 or section 2641 Burns 1894. *Ib.*

**DRAINS—**

1. *Completion.—Right of Landowner to be Heard.*—The act of 1891 (section 5690 *et seq.* Burns 1894) providing for the construction of public drains contemplates that the petition for the proposed ditch shall remain upon the docket until the final completion of the work; that when the work is completed the engineer is to make a final report to the board for its approval, and any landowner whose land is affected by the improvement is entitled to appear before the board and controvert the question of the completion of the ditch. *Studabaker v. Studabaker*, 89.
2. *Public Ditch.—Construction.—Duty of Engineer.*—It is the duty of the engineer who is appointed by the board of commissioners to superintend the construction of a public ditch, under the provisions of section 5690 *et seq.* Burns 1894, to see that the ditch is completed according to the terms of the contract, and upon the failure of the contractor to complete the work according to contract the engineer is invested with the power to have the job resold. *Ib.*
3. *Construction.—Assessment of Benefits.*—Under the provisions of sections 4285 and 4288, R. S. 1881, authorizing the construction of drains when the same shall be conducive to the public health, convenience, or welfare, or when the same will be of public benefit or utility, and the assessing of lands with benefits for the construction thereof, whether the drain passes through the lands assessed or not, whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, should be reckoned as benefits, whether the drain actually reaches the land and receives the water directly from it or not. *Culbertson v. Knight*, 121.
4. *Assessment of Benefits.*—In assessing benefits against lands for the construction of a drain for carrying off water discharged from such lands by artificial drains, the viewers may take into consideration that the upper landowners are liable to be enjoined by the owners of the lower lands from discharging waters collected by them by such drains. *Ib.*

**DRAINS—Continued.**

5. *Assessment of Benefits.*—Where the owner of an upper estate collects surface water into a body by a system of artificial drainage, or even cuts a channel that will enable the water to flow more rapidly or in a larger volume upon lower lands, benefits may be assessed against the upper lands for the construction of a drain upon the lower lands which provides means of escape of such water. *Ib.*
6. *Failure of Viewers to Report.*—Where viewers were appointed and ordered to report on a proposed drain at the March term of court, but, with the knowledge and acquiescence of the petitioners, did not report until the September term, an extension of time for good cause shown having been granted both at the March and the June terms, does not amount to an abandonment of the petition. *Bondurant v. Arney, 244.*
7. *Construction in Two or More Counties.—Jurisdiction of County Commissioners.*—Where a petition was filed in Kosciusko county for the construction of a ditch having its source in Kosciusko county and its terminus in Marshall county, and for an arm of such ditch having its source in St. Joseph county, the petition in so far as it relates to the construction of the arm was properly dismissed for want of jurisdiction, under section 24 of the act of April 21, 1881. *Ib.*
8. *Construction in Two or More Counties.—Joint Session of County Commissioners.*—Where a petition filed for the construction of a ditch extending into two counties, and for an arm of such ditch extending into a third county, was dismissed in so far as it related to the construction of the arm, it was not necessary in a joint session of the county commissioners that the third county be present. *Ib.*
9. *Public Ditch.—Board Determines when Ditch is Completed.*—The board of commissioners determines when a public ditch, constructed under the provisions of section 5690 *et seq.* Burns 1894, is completed according to the terms of the contract. *Studabaker v. Studabaker, 89.*
10. *Assessments.—Injunction.—Complaint.*—Before an action to enjoin the collection of an assessment for a public ditch can be maintained, the portion of the tax which is valid must be paid or a tender thereof made, and such fact must be alleged in the complaint or it will not be sufficient to repel a demurrer. *Ib.*
11. *Assessments.—Injunctions.—Complaint.*—An averment in a complaint to enjoin the collection of a ditch assessment that plaintiff has paid all the taxes due is but a conclusion of the pleader, and will be disregarded. *Ib.*
12. *Assessments.—Injunction.*—An injunction will not lie to prevent the collection of an assessment made for the construction of a public ditch for the reason that the ditch was not constructed according to the plans and specifications, where the complaint does not impute any invalidity to the proceedings establishing the ditch. *Ib.*

**EASEMENTS—**

1. *Right of Way.—Gates.*—Where one grants a right of way across his land, he may shut the termini of the same by gates, which the grantee must open and close when he uses the same, unless an open way is expressly granted. *Boyd v. Bloom, 152.*
2. *Deed.—Construction.—Right of Way.*—A provision in a deed that the grantee should have a free and undisturbed right to use a certain way out to the public highway is not the grant of an open way

**EASEMENTS—Continued.**

preventing the grantor from maintaining a reasonable number of gates across the way. *Id.*

**EMPLOYERS' LIABILITY ACT**—The act of March 4, 1893 (Acts 1893, p. 294) is constitutional. See CONSTITUTIONAL LAW, 6, 7; *Pittsburgh, etc., R. Co. v. Montgomery*, 1; *Pittsburgh, etc., R. Co. v. Hosea*, 412.

Action for personal injury caused by negligence of fellow servant acting as temporary foreman, see MASTER AND SERVANT, 15; *Hodges v. Standard Wheel Co.*, 680.

Action against railroad company for injury to employe caused by negligence of engineer, see RAILROADS, 1; *Pittsburgh, etc., R. Co. v. Montgomery*, 1.

As to release of railroad company from liability for injuries sustained by the acceptance of benefits therefor from a voluntary relief association, see RAILROADS, 2, 3; *Pittsburgh, etc., R. Co. v. Moore, Adm.*, 345; *Pittsburgh, etc., R. Co. v. Hosea*, 412.

**ESTOPPEL**—When acceptance of benefits by partner, accrued under decree of court in receivership, amounts to a waiver of right of appeal from appointment of receiver, see APPEAL AND ERROR, 55; *Williams v. Richards*, 528.

When the owners of lands annexed to a town are estopped from questioning the validity of annexation proceedings, see TOWNS, 3; *Hiatt v. Town of Darlington*, 570.

When defendant in an action to foreclose a mortgage is estopped from denying the validity of his title to the real estate, see PLEADING, 20; *Allen v. Studebaker Bros. Mfg. Co.*, 406.

1. *Pleading*.—Matters creating an estoppel must be specially pleaded. *Frain v. Burgett*, 55.
2. *Attachment—Appeal*.—Defendant in an action on an attachment undertaking for damages for the loss of the use of property pending an appeal to the Supreme Court from a judgment disallowing part of a claim in attachment will not be estopped from denying the sufficiency of the appeal bond to hold the property by the mere fact that the property attached was not released pending the appeal. *Waring v. Fletcher*, 620.

**EVIDENCE**—Exceptions to ruling on admission of evidence, see APPEAL AND ERROR, 6, 22; *La Plante v. State, ex rel.*, 80; *Illinois Central R. Co. v. Cheek*, 663.

Extrinsic evidence in the construction of wills, see WILLS, 1, 2; *Whiteman v. Whiteman*, 263.

Letter as evidence, see BOUNDARIES, 8; *Williams v. Atkinson*, 98.

Parol evidence is admissible for the purpose of aiding the description in chattel mortgage. See CHATTEL MORTGAGES, 5; *Baldwin v. Boyce*, 46.

County surveyor's record as evidence. See BOUNDARIES, 7, 8; *Williams v. Atkinson*, 98.

**EVIDENCE—Continued.**

- The executor of a will is a competent witness in support of the will as to matters accruing during the lifetime of the testator. *Whiteman v. Whiteman*, 263.
- Admissibility in evidence of the record of the trial and conviction of another charged with same offense, see CRIMINAL LAW, 13; *Davis v. State*, 145.
- In action to set aside deed on account of fraud, see DEEDS, 6, 8; *Givan v. Masterson*, 127.
- When fraud in the execution of a deed may be established by preponderance of evidence, see DEEDS, 7. *Ib.*
- When previous threats made by deceased against defendant are not admissible in evidence in the trial of a person charged with committing homicide, see CRIMINAL LAW, 6, 7; *Ellis v. State*, 326.
- The one who appeals from a survey of land, under section 5955 Horner 1897, has the burden of showing that the survey was incorrect. *Bennett v. Simon*, 490.
- As to weighing the evidence by the Supreme Court in a criminal cause, see CRIMINAL LAW, 12; *Ellis v. State*, 326.
- Opinion of a witness that a revolver used in committing an assault and battery with intent to commit murder would not probably kill at a given distance is inadmissible in evidence. See CRIMINAL LAW, 10; *Rains v. State*, 69.
- When evidence will not be considered where maps and plats referred to by witnesses are not in record, see APPEAL AND ERROR, 25; *Consolidated Stone Co. v. Summit*, 297.
- Sufficiency of in an action to set aside a conveyance as fraudulent, see FRAUDULENT CONVEYANCES, 1; *Hay v. Marsh*, 651.
- Supreme Court will not weigh. See APPEAL AND ERROR, 28, 29, 30, 31; *Pittsburgh, etc., R. Co. v. Beck*, 421; *Burr v. Smith*, 469; *Hatfield v. Cummings, Rec.*, 537; *Rownd v. State*, 39.
1. *Deed.—Description.—Reference to Addition of Town.*—Where a deed, introduced in evidence for the purpose of locating a particular piece of land, locates the starting point of the description of the land by reference to an addition to a town, it is not necessary to introduce in evidence the plat of the addition, the existence and location of which is not in dispute.  
*Pittsburgh, etc., R. Co. v. Beck*, 421.
  2. *Adverse Possession.—Declaration of Grantor.*—The declarations of grantor made at the time of negotiation and sale of real estate as to the boundaries thereof are admissible in evidence in an action by grantee to enjoin an adjoining owner from encroachment, where the title of plaintiff depended upon adverse possession.  
*Burr v. Smith*, 469.
  3. *Personal Injuries.—Railroads.*—Where, in the trial of an action for damages on account of personal injuries sustained by plaintiff in catching his foot in an exposed wire used in an interlocking switch device while coupling cars, the court permitted defendant to show that other first-class roads constructed such switches in a similar manner, no error was committed in refusing

**EVIDENCE—Continued.**

it the right to show the particulars in the construction of such switches, other than upon its own road.

*Indiana, etc., R. Co. v. Bundy, 590.*

4. *Personal Injuries.—Railroads.*—In the trial of an action for a personal injury sustained by plaintiff in catching his foot on a wire used in a switching device while coupling cars, evidence of defendant's foreman of the switching crew that he had notified the superintendent prior to plaintiff's injury that the exposed wires were dangerous to men working around the track, and the superintendent's reply thereto, was properly admitted in evidence. *Ib.*
5. *Railroads.—Personal Injuries.—Rules of Company.*—Rules of a railroad company for the government and information of its employees are not admissible in evidence in the trial of an action against the railroad company for a personal injury to an employee, where it was not shown that plaintiff had ever received a copy of the rules. *Ib.*
6. *Review.—Special Finding.*—Where there is evidence which, if standing alone, supports the finding of the trial court, it is the duty of the Supreme Court to accept such evidence and disregard all evidence in conflict therewith. *Hay v. Marsh, 651.*

**EXECUTION—**

When a judgment defendant to whom the judgment has been assigned is entitled to execution, see JUDGMENTS, 2; *Zimmerman v. Gaumer, 552.*

1. *Judgment.—Sales.—Secret Equities.*—A judgment creditor who in good faith buys land at an execution sale on his own judgment takes the land free from prior secret equities of which he had no notice in like manner as a stranger purchaser. *Boling v. Howell, 39 Ind. 329, Petry v. Ambroscher, 100 Ind. 510, Tarkington v. Purvis, 128 Ind. 182, Orb v. Coapstick, 136 Ind. 313, and Shirk v. Thomas, 121 Ind. 147, in so far as they may be deemed to affirm the contrary doctrine, are disapproved. Pugh v. Highley, 252.*
2. *Trust Estate.*—Where lands were devised to trustees who were to keep the same rented and pay the rents and profits collected to the son of testatrix annually during his life, or if the son should fail to provide for his family, to apply a sufficient amount thereof to its support, and pay to the son the overplus, and at his death to convey the lands to certain persons, with power to sell and convey the land at any time and account for the interest and purchase money in the same manner as the land and its rents were to be accounted for, the son has no interest in the lands subject to sale on execution for his debts, under subdivision four of section 752 R. S. 1881. *Zimmerman v. Makepeace, 199.*
3. *Supplementary Proceedings.—Life Insurance.—Assignment of Policy.*—Plaintiff sought by proceedings supplementary to execution to subject to the payment of her judgment against defendant, an endowment insurance policy on the life of defendant, which policy by its terms was payable fifteen years after date to the insured, his heirs, executors, administrators, or assigns. Before the commencement of the action the policy was sold and assigned by defendant to his wife. *Held*, that in the absence of fraud in the assignment of the policy the action could not be maintained. *Rodwell v. Johnston, 525.*

**EXECUTION SALE**—When execution sale of real estate may be enjoined, see **INJUNCTION 1**; *Zimmerman v. Makepeace*, 199.

**EXHIBIT**—When not the foundation of the action it cannot be considered in determining the sufficiency of the pleading. See **PLEADING, 24**; *Indiana Mut. Building, etc., Assn. v. Plank*, 197.

**EX POST FACTO LAWS**—Indeterminate sentence law (Act of March 8, 1897) not *ex post facto*. See **CRIMINAL LAW, 24**; *Davis v. State*, 34.

**FORGERY**—

*Affidavit and Information*.—An affidavit and information charging that defendant "altered, forged and counterfeited a certain written receipt" is bad for repugnancy. *State v. Bracken*, 565.

**FRAUD**—In procuring the execution of a contract, see **CONTRACTS, 2**; *Givan v. Masterson*, 127.

When fraud in the execution of a deed may be established by preponderance of the evidence, see **DEEDS, 7**. *Ib.*

When deed executed without reading will be set aside on account of fraud, see **DEEDS, 1**. *Ib.*

Sufficiency of evidence to sustain finding of fraud, see **APPEAL AND ERROR, 31**; *Rownd v. State*, 39.

Abuse of confidential relations of husband and wife, see **HUSBAND AND WIFE, 6, 7, 8**; *Basye v. Basye*, 172.

**FRAUDULENT CONVEYANCES**—

1. *Evidence.—Sufficiency*.—In an action to set aside a conveyance as fraudulent grantor testified that he had received from the grantee several items of cash and personal property; that these had not supplied the consideration for the conveyance, but that he had assigned a certain judgment in payment or as security therefor; that grantee gave nothing for the deed; that he told grantee of his indebtedness to plaintiffs, and grantee "said he would do them up." *Held*, that the evidence was sufficient to set aside the conveyance as fraudulent against creditors. *Hay v. Marsh*, 651.

2. *Husband and Wife.—Excessive Judgment.—Relief*.—No error was committed in overruling defendant's motion for judgment in an action to set aside as fraudulent a conveyance of real estate from husband to wife, where the facts found showed that after deducting the wife's one-third interest in the real estate conveyed, and the husband's \$800 exemption, there remained a small balance subject to plaintiff's debt, as defendant's remedy was by motion to modify the judgment. *Nelson v. Cottingham*, 135.

**HIGHWAYS**—See **EASEMENTS**.

1. *Establishment.—Petition.—Railroad Crossing*.—Where a petition for the establishment of a public highway which crosses a railroad right of way does not ask for a crossing under the tracks, it will be held to be a petition for the location of a highway to cross the railroad tracks at grade. *Anderson v. Johnson*, 249.

2. *Change of Location.—Railroad Crossings.—Instructions*.—In the trial of an action to change the location of a public highway, which had been established, but not opened, the court in one instruction told the jury that the highway proposed to be vacated must cross

**HIGHWAYS—Continued.**

- the railroad at grade and not under it; in another that such highway may be carried under the railroad, if that be the most convenient manner of crossing, and in another instruction informed the jury that it could not be judicially determined what kind of a crossing will be constructed across the railroad on the line of the highway sought to be vacated. The highway sought to be vacated, as shown in the petition therefor, crosses the railroad at grade. *Held*, that the first instruction correctly stated the law and that the second and third were in direct conflict therewith and erroneous. *Ib.*
3. *Construction of Free Gravel Roads.*—Under sections 5091, 5092 Horner 1897, the board of county commissioners is empowered to levy an additional assessment upon the lands benefited by the improvement of a public highway, when the original assessment proves to be insufficient. *Kline v. Board, etc., 321.*
  4. *Free Gravel Roads.—Additional Assessment.*—The original order of the board of county commissioners in a proceeding for the construction of a free gravel road is not a final determination of the question of benefits accruing to adjacent landowners, and does not preclude the board from making a second assessment to meet a deficit in the cost of such improvement. *Ib.*
  5. *Free Gravel Roads.—Additional Assessment.—Statute of Limitations.*—Where the original assessment of benefits to adjacent lands was not sufficient to meet the entire cost of the improvement, and proceedings were instituted by the board of county commissioners for an additional assessment of such lands, the six-years statute of limitations has no application. *Ib.*
  6. *Free Gravel Roads.—Additional Assessment to Reimburse County.*—An additional assessment to meet the cost of constructing a free gravel road cannot be defeated by the fact that the cost of the improvement had been fully paid by the county, and that the purpose of the assessment was to reimburse the county. *Ib.*
  7. *Construction of Free Macadamized Road.—Irregularities in Making Assessments.—Injunction.—Collateral Attack.*—A suit to enjoin a county treasurer from collecting assessments to pay the expenses for the construction of a free macadamized road, being a collateral attack, mere irregularities and defects in making the assessments cannot be inquired into. *Layman v. Hughes, 484.*
  8. *Suit to Enjoin Collection of Assessments for Construction of Free Macadamized Road.—Complaint.*—A complaint to enjoin the collection of assessments for the construction, under the act of March 3, 1877, of a free macadamized road, alleging that plaintiff's lands had not been reported by any engineer, or by viewers, as benefited, is insufficient without a further allegation as to what the record of the board of county commissioners discloses on the subject since ample authority is conferred upon such commissioners to make all needed corrections and supply all omissions. *Ib.*
  9. *Vehicle on Sidewalk.—Bicycle a Vehicle.*—A bicycle is a vehicle the riding of which on a sidewalk of a city or town is a public offense punishable under section 3361 R. S. 1881. *Town of Whiting v. Doob, 157.*

**HOMICIDE**—See CRIMINAL LAW.

**HUSBAND AND WIFE—**

Inchoate interest of wife in husband's real estate, see **DEEDS**, 5;  
*Frain v. Burgett, 55.*



**HUSBAND AND WIFE—Continued.**

Interest of childless second wife in lands of husband, see DESCENT AND DISTRIBUTION, 1, 2; *Helt v. Helt*, 142.

As to fraudulent conveyance from husband to wife, see FRAUDULENT CONVEYANCES, 2; *Nelson v. Cottingham*, 135.

A husband cannot maintain an action against his wife's estate for an indebtedness created before their marriage. *Gosnell v. Jones*, Adm., 638.

Where a husband and wife executed a note for money loaned the wife and used by the husband, the husband is principal and the wife surety. *Lackey v. Boruff*, 371.

1. *Advancement to Wife*.—It will be presumed, in the absence of evidence, that payments made by the husband upon the debts of his wife were made as an advancement to her by virtue of her marital rights, and she is not bound to repay the same.  
*Gosnell v. Jones*, Adm., 638.
2. *Principal and Agent*.—*Recovery of Money Expended in Management of Wife's Estate*.—*Burden of Proof*.—In order to sustain a claim by a husband against his wife's estate for money used by him in payment of her debts and other expenses incident to the management of her estate, the burden rests upon the husband of proving that he used his own money. *Ib.*
3. *Principal and Surety*.—*Bills and Notes*.—*Married Women*.—A note executed by a husband and wife in renewal of a note for money loaned the wife and used by the husband, executed prior to the act of 1881 (sections 6960-6970 Burns 1894), enlarging the rights of married women, is a valid and binding obligation of the husband, although void as to the wife, whether he executed the same as principal or only as surety for his wife. *Lackey v. Boruff*, 371.
4. *Inchoate Interest of Wife in Lands of Husband*.—A wife cannot be said to take the interest given her by section 2491 R. S. 1881, through her husband, but such interest attaches as an incident to his seisin during coverture and cannot be divested through any charge or conveyance made by him, unless she joins therein.  
*Frain v. Burgett*, 55.
5. *Purchase-Money Mortgage Executed by Husband Alone*.—*Foreclosure*.—*Inchoate Interest of Wife*.—A purchaser of real estate at a foreclosure sale under a mortgage executed by the husband alone takes under such sale nothing more than the interest or title of the husband, which does not embrace the inchoate interest of the wife; and if the mortgage be for purchase-money it is then held by the purchaser subject to the right of the wife to redeem in the manner and under the conditions provided by law. *Ib.*
6. *Abuse of Confidential Relations*.—*Fraud*.—*Equitable Relief*.—Whenever the confidence resulting from a relationship of special trust and confidence, such as should exist between husband and wife, is abused equity will afford relief. *Basye v. Basye*, 172.
7. *Demonstrations of Love*.—*Promise as to Future Conduct*.—*Representation of Existing Fact*.—*Fraud*.—Professions and demonstrations of love and promises as to future conduct, when made by a wife to her husband, are representations concerning a present fact, and when falsely made to induce the husband to convey to her his real estate, fraud may be predicted thereon. *Ib.*
8. *Conveyance to Wife*.—*Fraud*.—*Rescission*.—Where a wife, who had treated her husband coldly for a long time without cause, sud-

**HUSBAND AND WIFE—Continued.**

denly became profuse in her professions and demonstrations of love and thereby induced him to deed her certain real estate without consideration other than that the title should be in her as his wife and in trust for him, and that their marital relations, should continue peaceful and loving, after which she immediately abandoned him without cause and began suit for divorce, the conveyance should be set aside. *Rose v. Rose*, 98 Ind. 179, in so far as it might be considered an authority to the contrary, is overruled. *Ib.*

**INDETERMINATE SENTENCE LAW**—Is not an *ex post facto* law within the meaning of section 24, article 1, of the Constitution. See **CRIMINAL LAW**, 24, 25; *Davis v. State*, 34.

**INFANTS**—Infant as trespasser on street car, see **STREET RAILWAYS**, 2; *Udell v. Citizens Street R. Co.*, 507.

**INJUNCTION**—The court of one county may restrain the illegal sale of lands in such county under an execution issued from the court of another county. See **COURTS**, 1; *Zimmerman v. Makepeace*, 199.

Sufficiency of complaint in action to enjoin the collection of ditch assessment, see **DRAINS**, 10, 11, 12; *Studabaker v. Studabaker*, 89.

An alleged error in refusing to dissolve a restraining order is waived by putting the cause at issue and proceeding to trial on the merits. *Zimmerman v. Makepeace*, 199.

An appeal from a term time interlocutory restraining order cannot be taken after the close of the term. *Zimmerman v. Makepeace*, 199.

1. *Executions*.—Courts of equity have jurisdiction to enjoin an execution sale of real estate which might cloud and complicate the title thereof, although such sale would pass no right or title to the purchaser. *Ib.*
2. *Pipe Line*.—One who lays a pipe line for conducting gas through the lands without the permission of the owner thereof, is not entitled to maintain a suit to enjoin such landowner from removing the pipe line. *Windfall Nat. Gas, etc., Co. v. Terwilliger*, 364.
3. *Laying Pipe Line on Land of Another Without License—Removal by Landowner*.—A gas company that lays a pipe line through lands without permission of the owner is not entitled to maintain a suit to enjoin the landowner from removing the pipe line. *Ib.*

**INSTRUCTIONS**—As to good character of defendant in a criminal case, see **CRIMINAL LAW**, 11; *Rains v. State*, 69.

Erroneous instructions as to elements which enter into the crime of murder are harmless, where defendant was convicted only of the crime of assault with intent to commit manslaughter. See **CRIMINAL LAW**, 16; *Ib.*

As to reasonable doubt, see **CRIMINAL LAW**, 17; *Ib.*

As to the law of self-defense, see **CRIMINAL LAW**, 18, 19; *Davis v. State*, 34; *Rains v. State*, 69.

An instruction directing the jury to assess the punishment of defendant if they found him guilty, when under the law, they could

**INSTRUCTIONS—Continued.**

determine only the question of guilt or innocence, is harmless. See *CRIMINAL LAW*, 20; *Davis v. State*, 145.

When cause will not be reversed on account of erroneous instruction. see *APPEAL AND ERROR*, 48; *La Plante v. State, ex rel.*, 80.

Joint assignment of error upon action of court in refusing to give certain instructions, see *APPEAL AND ERROR*, 10; *Consolidated Stone Co. v. Summit*, 297.

May be made part of record by order of court. See *APPEAL AND ERROR*, 18; *Pennsylvania Co. v. Ebaugh*, 531.

The presumptions, on appeal, in favor of the action of the trial court extend to the giving of instructions. See *Hamilton v. Love*, 641.

1. *Time of Presentation.*—Defendant's exception to the refusal of the court to give instructions tendered is not prejudiced by a recital in the record showing that the instructions were offered and rejected before the close of the evidence.  
*Indiana, etc., R. Co. v. Bundy*, 590.
2. *Exception.—Marginal Notes.*—An exception to the refusal of the court to give an instruction tendered by defendant is properly reserved by an indorsement on the margin thereof "refused and excepted to," although such marginal notes do not disclose which party excepted. *Ib.*
3. *Exception.—Marginal Notes.*—An exception to an instruction given by the court on its own motion by an indorsement on the margin thereof "given and excepted to" is not properly reserved, where it is not properly shown by the bill of exceptions that either party took or reserved exceptions to such instructions. *Ib.*
4. *Refusal to Give.*—The refusal of instructions is not error where the instructions offered were given in substance by the court on its own motion. *Ib.*
5. *Must be Considered as a Whole.*—Where the instructions to the jury, taken as a whole, state the law correctly, the cause will not be reversed on appeal, though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge.  
*Hamilton v. Love*, 641.
6. *Must be Considered Together.*—An inaccurate instruction will not operate in reversing a judgment, where the instructions considered as a whole correctly advised the jury relative to the law by which they were to be controlled in arriving at a verdict.  
*LaPlante v. State, ex rel.*, 80.
7. *Issues Upon Which There Was no Evidence.*—The court is not required to instruct the jury as to issues upon which there was no evidence.  
*Whiteman v. Whiteman*, 263.
8. *Abstract Rules of Law.*—The court is not bound to give instructions which state mere abstract rules of law, without explanation or qualification. *Ib.*
9. *Correct as Abstract Proposition of Law.*—An instruction which leaves the jury in doubt or uncertainty as to how it should be applied to the evidence, although correct as an abstract proposition of law, is erroneous.  
*Davis v. State*, 34.

**INSTRUCTIONS—Continued.**

10. *Irrelevant Instructions.—Criminal Law.*—Giving instructions irrelevant to the issues and evidence constitutes reversible error, where such instructions tend to injure the complaining party.  
*Robinson v. State, 304.*
11. *Irrelevant Instructions.—Criminal Law.*—Giving an instruction defining self-defense in a prosecution for an assault and battery with intent to commit manslaughter does not amount to reversible error, although the evidence showed that defendant was at no time assaulted nor menaced by any threat, sign or gesture, nor at any time in a situation to apprehend bodily harm. *Ib.*
12. *Irrelevant Instructions.—Criminal Law.*—Error cannot be predicated by defendant on the giving of an instruction defining malice and stating some elements of proof thereof as related to murder, where defendant was convicted of assault and battery with intent to commit manslaughter. *Ib.*
13. *When Correct as Applied to One Issue.*—Giving an instruction correct in form and substance as to one of the issues of the cause, not purporting to apply to other issues, and directing the jury to find for the defendant if that issue was determined in his favor, is not reversible error, where the jury was properly instructed as to the other issues in the cause in subsequent instructions given.  
*Whiteman v. Whiteman, 263.*
14. *Special Verdict.*—Where a special verdict is requested no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict and the facts to be found therein.  
*Udell v. Citizens Street R. Co., 507.*
15. *Wills.—Loss of Memory.*—No error was committed in refusing to instruct the jury in the trial of an action to contest a will that a person who has lost his memory is incapable of making a valid will.  
*Whiteman v. Whiteman, 263.*
16. *Railroads.—Personal Injury.—Master and Servant.—Knowledge of Danger.*—An instruction in the trial of an action against a railroad company for injury to a brakeman caused by catching his foot in a wire used in connection with an interlocking switch device, to the effect that if plaintiff knew the method of operating interlocking switches he was bound to know the particular grounds occupied by the wires, is erroneous, where no reference is made to plaintiff's opportunity for observation or inquiry, or to the number of tracks at the place of the accident.  
*Indiana, etc., R. Co. v. Bundy, 590.*
17. *Assault and Battery.—Criminal Law.*—An instruction to the effect that if the jury believed, beyond a reasonable doubt, that defendant committed the assault and battery charged in the indictment, and that at the time he did so he was in a sudden heat of passion, produced by the prosecuting witnesses, or either of them, in the employment of personal violence upon him, and being in such heat, before sufficient time had elapsed for the heat to cool, he, by said assault and battery, without malice, purposed and designed to kill, then the defendant should be found guilty of assault and battery with intent to commit voluntary manslaughter, is not bad for obscurity, nor by reason of its failure to qualify the degree of violence defendant must suffer before he became entitled to the principle of self-defense.  
*Robinson v. State, 304.*

**INSURANCE**—Assignment of life insurance policy to wife, see EXECUTION, 3; *Rodwell v. Johnston*, 526.

Payment of amount due on life insurance policy to wrong person, see ASSUMPSIT; *Shultz v. Boyd*, 166.

**INTERROGATORIES TO JURY**—See PRACTICE; SPECIAL VERDICT.

1. *When Properly Rejected*.—Interrogatories which do not call for findings of essential facts within the issues are properly rejected. *Illinois, etc., R. Co. v. Cheek*, 663.
2. *Practice*.—No error was committed in refusing to submit certain interrogatories to the jury prepared and tendered by counsel, where the interrogatories submitted covered every material question of fact in the case. *Udell v. Citizens St. R. Co.*, 507.
3. *When Properly Rejected*.—*Special Verdict*.—Where a special verdict is so framed, by means of interrogatories, that the jury can find, under the evidence, all the material facts of the case, neither party can successfully complain of the action of the court in rejecting interrogatories submitted. *Ib.*
4. *When Not in Conflict with General Verdict*.—*Master and Servant*.—Answers to interrogatories in an action for damages on account of injuries sustained by plaintiff while at work in defendant's stone quarry by reason of a bank of clay falling upon him, that plaintiff had worked in the quarry for over a year and knew that mud seams and dry seams were usual in the quarry; that he received no specific command on the day of the injury to go to the place where he was at work when injured; that at the time he went beneath the embankment, and before it fell upon him, he examined the embankment with the eye and was prevented by sand and mineral deposit from seeing the exact character of the mud bank are not in irreconcilable conflict with a general verdict for plaintiff. *Peerless Stone Co. v. Wray*, 27.

**INTOXICATING LIQUORS**—The act of April 10, 1885, authorizing town trustees to license the sale of intoxicating liquors is void. See STATUTES, 3; *Copeland v. Town of Sheridan*, 107.

*License by Town*.—By the act of March 31, 1879 (Acts 1879, p. 201), the seventh clause of the act of 1852 was amended so as to authorize town trustees to license the sale of vinous, malt, and other intoxicating liquors, charging a license fee not to exceed the amount required by the statutes of the State to sell or retail intoxicating liquors; the sum then required by the State for a license to sell spirituous, vinous, and malt liquors, was \$100; and for a license to sell vinous and malt liquors only, \$50. *Held*, that construing said laws together a town had the right to issue a license to sell intoxicating liquors generally, and charge a license fee of \$100.

*Copeland v. Town of Sheridan*, 107.

**JEFFERSONVILLE CITY BONDS**—As to act of legislature legalizing Jeffersonville city bonds, see CONSTITUTIONAL LAW, 2, 3, 4, 5; *Schneck v. City of Jeffersonville*, 204.

**JUDGMENTS**—See SPECIAL FINDING.

As to remedy for excessive judgment, see FRAUDULENT CONVEYANCES, 2; *Nelson v. Cottingham*, 135.

1. *Payment by One Primarily Liable*.—*Assignment by Judgment Plaintiff*.—The payment of a judgment by one primarily liable for the payment thereof amounts to an absolute satisfaction of the same,

**JUDGMENTS—Continued.**

- although the judgment is assigned by the judgment plaintiff to the person paying it. *Zimmerman v. Gaumer, 552.*
2. *Payment by Judgment Defendant.—Assignment.—Principal and Surety.*—When a judgment is paid by one of the judgment defendants and the judgment assigned to him he is not entitled to an execution thereon until it has been judicially determined, either that he was surety on the contract upon which the judgment was rendered, or that he stood in that relation to the judgment when he paid the same, or that as between himself and the other judgment defendants, he paid more than his share of the judgment. *Ib.*
  3. *Motion in Arrest.—Sufficiency.*—A motion in arrest of judgment on the ground that the complaint had been changed in a material part without leave of the court after the cause had been reversed by the Supreme Court is properly overruled, where it does not appear when or by whom the alteration was made, or at what time it was discovered. *Hatfield v. Cummings, Rec., 557.*
  4. *Motion for New Trial.—When Does Not Operate as Stay of Execution.*—A motion for a new trial filed after entry of judgment, and within the time allowed by law, does not operate as a stay of execution on the judgment. *Logan v. Sult, 434.*
  5. *Nunc Pro Tunc Entry.*—The oral announcement in open court to the counsel of both parties that the court rendered and would cause to be entered a judgment for the plaintiff is not a sufficient basis for the entry of a judgment *nunc pro tunc*. *Boyd v. Schott, 161.*
  6. *Vacation of When Taken by Agreement of Attorney Acting Without Authority.—Physician.—Certificate to Practice Medicine.*—In conformity with the act of March 8, 1897, an application for a certificate to practice medicine was filed with the State Board of Medical Registration and Examination. The certificate was refused "on the ground that the applicant had been and was guilty of gross immorality." The applicant appealed to the circuit court, where, by agreement of an attorney acting for the prosecuting attorney without authority, a judgment was entered that the applicant was entitled to a certificate which the board was directed to issue. *Held*, that the judgment so taken could not be sustained. *In re Application of Coffin, 439.*

**JUDICIAL SALES**—See **INJUNCTION**. A judgment creditor who in good faith buys land at an execution sale on his own judgment takes the land free from prior secret equities of which he had no notice. See **EXECUTION**, 1; *Pugh v. Highley, 252.*

**JURISDICTION**—Of board of county commissioners as to claims against county, see **COUNTIES**, 3; *Myers v. Gibson, 500.*

**JURY**—Misconduct of in separating without leave, see **CRIMINAL LAW**, 22, *Jones v. State, 313.*

When verdict will not be set aside because of misconduct of bailiff in talking to jury, see **CRIMINAL LAW**, 21; *Messenger v. State, 297.*

*Juror Excused on Court's Own Motion.—When Not Erroneous.*—It is not error for the court on its own motion to excuse a juror, where it is not shown that the jury which was finally impaneled was not a fair and impartial jury. *Pittsburgh, etc., R. Co. v. Montgomery, 1.*

**LANDLORD AND TENANT—**

1. *Lease for Coal Mining Purposes.—Implied Obligations to Begin Mining Within a Reasonable Time.*—Where in a lease of lands for

**LANDLORD AND TENANT—Continued.**

coal purposes the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal mined, the lessee thereby, in the absence of any provisions to the contrary, impliedly obligates himself to begin the mining of the coal within a reasonable time after the execution of the lease. *Island Coal Co. v. Combs*, 379.

2. *Lease for Coal Mining Purposes.—Forfeiture.*—A provision in a lease of lands for coal purposes, under penalty of forfeiture, that within a specified time the necessary work for developing the coal interests in the lands leased, by opening shafts so that the underlying coal may be removed and transported to market, requires that the mining of coal should be commenced within the time specified, and that the construction and equipment of shafts is not a sufficient compliance with the terms of the lease so as to prevent a forfeiture. *Ib.*
3. *Breach of Condition of Lease.—Acquiescence of Lessor.—Waiver.* Mere acquiescence of the lessor is not to be construed as a waiver of a breach of a condition of forfeiture. *Ib.*
4. *Breach of Condition in Lease.—Forfeiture.—Demand.*—Where the owner of leased premises is in possession, such owner is not required to make demand for possession on a forfeiture of the lease. *Ib.*
5. *Breach of Condition in Lease.—Forfeiture.—Demand.—Waiver.*—A provision in a lease, that the lessors, upon the violation of a certain condition therein, may, without demand, notice or act, re-enter the premises, is an express waiver upon the part of the lessee of all demand or notice upon a breach of the condition of forfeiture. *Ib.*

**LAW OF CASE**—As to sufficiency of complaint, see **APPEAL AND ERROR**, 2; *Hatfield v. Cummings*, *Rec.*, 537.

All questions decided by the Supreme Court become the law of the case from that time forward. See **APPEAL AND ERROR**, 1; *Brunson v. Henry*, 310.

**LIENS**—The lien of a mortgage foreclosed more than a year after the filing of a mechanic's lien is senior to that of the mechanic's lien, where the holder of the mortgage was not made a party to the suit to foreclose the mechanic's lien. See **MECHANIC'S LIEN** 1, 2; *Union Nat. Savings, etc., Assn. v. Helberg*, 139; *Stoermer v. Peoples Savings Bank*, 104.

**LIFE ESTATES**—Recital in deed reserving life estate, see **DEEDS**, 8; *Kelley, Gdn., v. Shimer, Adm.*, 290.

**LIMITATION OF ACTIONS—**

One who is made a defendant in an action to foreclose a mortgage because he claims an interest in the mortgaged property cannot plead the statute of limitations unless he alleges facts showing that he has an interest in the property. See **PLEADING**, 25; *Corbey v. Rogers*, 169.

*Amended Complaint.*—An amended complaint which does not introduce a new cause of action has reference to the time of the filing of the original complaint, and a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced. *Peerless Stone Co. v. Wray*, 27.

**MACADAMIZED ROADS**—See **HIGHWAYS**.

**MALICIOUS PROSECUTION—**

1. *Termination of Prosecution.*—Where a person was recognized to appear before the circuit court at the November term thereof to answer to the charge of larceny, and the grand jury at the September term of court investigated the charges against accused, and endorsed on the papers, certified to the circuit court by the justice of the peace, the word "Ignoramus," such action will not amount to a termination of the prosecution. *Stark v. Bindley, 182.*
2. *Termination of Prosecution.*—An action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of the defendant therein. *Ib.*

**MARRIAGE—**

*Extinguishment of Debts.—Husband and Wife.*—A husband cannot maintain an action against his wife's estate for an indebtedness created before their marriage. *Gosnell v. Jones, Adm., 638.*

**MARRIED WOMEN—See HUSBAND AND WIFE.**

Contract of suretyship by a married woman is voidable and not void. See **PRINCIPAL AND SURETY**, 1; *Lackey v. Boruff, 371.*

**MARSHALING ASSETS—**

1. *Liens.—Judgments.—Complaint.*—A complaint by a judgment creditor to set aside certain chattel mortgages upon property levied upon, and to sell said encumbered property, and marshal the assets and distribute the same to the persons holding liens thereon according to their priority, and for the appointment of a receiver is sufficient without any allegations as to fraudulent intent and purpose in the execution of the mortgages. *Round v. State, 39.*
2. *Liens.*—Where one has a lien on two or more funds as security for a debt, and another has a lien on one only of such funds, and others have liens, some on all of such funds, and some only on a part thereof, a bill to marshal the assets will lie. *Ib.*

**MASTER AND SERVANT**—Sufficiency of complaint in action for personal injuries sustained while at work in a stone quarry to show negligence on part of defendant and freedom from contributory negligence on part of plaintiff, see *Peerless Stone Co. v. Wray, 27.*

Contract by employe of railroad company with voluntary relief association as to release of liability of railroad company for injuries or death, see **RAILROADS**, 2, 3; *Pittsburgh, etc., R. Co. v. Moore, Adm., 345; Pittsburgh, etc., R. Co. v. Hosea, 412.*

Presumption as to servant's knowledge of danger, in an action against master for personal injuries, see **INSTRUCTIONS**, 16; *Indiana, etc., R. Co. v. Bundy, 590.*

1. *Wrongful Discharge of Servant.—Complaint.*—A complaint in an action by an employe for his wrongful discharge, alleging a violation of the contract of employment, the amount plaintiff would have earned under the contract, and demanding judgment therefor, sufficiently alleges the damages so as to make the complaint good on demurrer. *Hamilton v. Love, 641.*
2. *Disobedience of Servant in Immaterial Matters.*—An employer has no right to discharge an employe before the expiration of the term of employment for trivial and unimportant acts of disobedience or negligence. *Ib.*



**MASTER AND SERVANT—Continued.**

3. *Breach of Contract of Employment.—When Action May be Brought.*—An employe who has been wrongfully discharged may bring suit immediately upon the breach of the contract of employment and recover his full damages to the end of the term for which he was employed. *Ib.*
4. *Disobedience of Servant.—Discharge.*—The failure of an employe to observe his employer's rules for conducting business, of which rules the employe had no notice, is not sufficient reason for discharging an employe before the expiration of the time for which he was employed. *Ib.*
5. *Wrongful Discharge of Servant.—Complaint.*—In an action by an employe for his wrongful discharge the complaint need not show that plaintiff could not, with reasonable care and diligence, have obtained other equally profitable employment during the remainder of the life of the contract, since that is a matter of defense. *Ib.*
6. *Negligence.—Personal Injuries.—Proximate Cause.*—Plaintiff was employed by defendant to turn switches at an intersection of its street car lines, and, after turning a switch on the south track, stepped backward toward the north track, and so near it that he was struck by a car going west on the north track, and was injured. There was room for him to stand safely between the tracks at the point where he was injured, but he stepped backward too far in order to avoid a frightened team of horses drawing a car on the south track. *Held*, that the threatening appearance of the horses drawing the approaching car was the proximate cause of the accident, which was one of the risks of the employment assumed by plaintiff. *Thompson v. Citizens Street R. Co., 461.*
7. *Negligence.—Railroads.*—An employe of a railroad company has a right to believe, and rely upon the belief, that the company will obey a city ordinance regulating the speed of trains and requiring all backing trains, or reversed engines, with tenders in front, to carry a light in front at night, and to sound the whistle and ring the bell. *Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*
8. *Personal Injuries.—Knowledge of Danger.—Assumption of Risk.*—The mere fact that a servant may know or could have known of a defect by the exercise of ordinary care does not necessarily charge him with an assumption of the risk growing out of such defect, because the risks and hazards on account thereof may not be so open and apparent as to be appreciated by him on account of his ignorance or want of experience. *Consolidated Stone Co. v. Summit, 297.*
9. *Knowledge of Danger.—Assumption of Risk.*—An employe assumes not only the ordinary dangers of his employment which are known to him, but also such as by the exercise of ordinary diligence would have been known to him. *Pennsylvania Co. v. Ebaugh, 531.*
10. *Assumption of Risk by Servant.*—An employe who has knowledge, or who by the exercise of ordinary diligence or observation can learn the imperfections of machinery or appliances with which he works, or the hazards of the premises where he performs the duties of his employment, and continues in the service without objection or promise of repairment, will be deemed to have assumed all the risks incident to such defects and hazards. *Wabash R. Co. v. Ray, Adm., 392.*

**MASTER AND SERVANT—Continued.**

11. *When Hazard Assumed by Servant.*—Where a danger or hazard of the business is alike open to the observation of all, the master and the servant, under such circumstances, are on an equality, and the former is not liable to the latter for an injury resulting from such danger. *Ib.*

12. *Railroads.—Negligence.—City Ordinance Regulating Manner of Running Trains.*—The power of a city to pass an ordinance regulating the manner of running trains in the city limits is conferred as a police power, and the fact that a person is in the service of a railroad company affected by such ordinance presents no reason for depriving him of its protection.

*Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*

13. *Railroads.—Brakeman.—Assumed Risk Incident to Unblocked Space at End of Guard-rail.*—Plaintiff's intestate, acting in the capacity of freight brakeman in the employment of defendant company, passed over defendant's line of railroad once a day, except Sunday, for a month prior to the accident which resulted in his death. During the period of such employment the defendant company constructed guard-rails at fifty of the crossings over such road. The open spaces at the ends of such guard-rails were all left unblocked. Plaintiff's intestate, who knew, or might have known by the exercise of ordinary care, that the spaces at the ends of the guard-rails were left unblocked, and while attempting to make a coupling caught his foot in one of the open spaces, and before he could extricate it he was run over by the cars and killed. *Held*, that plaintiff's intestate assumed the risk incident to the unblocked space at the end of the guard-rail.

*Wabash R. Co. v. Ray, Adm., 392.*

14. *Fellow Servant.—Damages.—Personal Injuries.*—Plaintiff was employed to assort and grade pieces of timber to be used as wheel rims, and to do other common labor about defendant's factory. H. who was employed to do similar work, and who had been authorized by the foreman of that department to direct the men as to the details of the work while he was temporarily absent in another part of the building, instructed plaintiff to remove some lumber from the room in which the rims were stored. H. assisted plaintiff in removing the lumber, and through his negligence alone the rims fell upon plaintiff and injured him. *Held*, that H. was acting solely as a fellow servant, and not as a representative of defendant, and as his negligence was the sole cause of the injury, plaintiff cannot recover. *Hodges v. Standard Wheel Co., 680.*

15. *Fellow Servant.—Employers' Liability Act.*—Plaintiff is not entitled to recover under subdivision 2 of section 1 of the Employers' Liability Act (Acts 1893, p. 294) for a personal injury sustained while in the employ of defendant, where the injury was caused wholly by one engaged with him in the work, but who was placed in charge of the men by the foreman while he was temporarily absent in another part of the building. *Ib.*

16. *Negligence.—Railroads.—Co-employees.*—In the trial of an action against a railroad company for damages on account of the death of an employe caused by the alleged negligence of the defendant, the jury have the right, under section 7083 Burns 1894, to impute the disregard of defendant's engineer of a city ordinance regulating the speed of trains, and the manner of backing trains, as negligence of defendant.

*Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*

**MECHANIC'S LIEN—**

1. *Foreclosure.—Failure to Make Holder of Junior Mortgage a Party.*—A mechanic's lien was foreclosed and the property purchased by the lien holder under a decree of foreclosure. The holder of a mortgage junior to the mechanic's lien was not made a party to the proceedings. *Held*, in an action to foreclose the mortgage, which action was brought more than a year after the notice of intention to hold the lien was filed, that the holder of the mechanic's lien had lost the seniority thereof, but had an owner's equity of redemption. *Union Nat. Savings, etc., Assn. v. Helberg, 139.*
2. *Foreclosure of Mortgage.—Expiration of Lien.*—A mechanic's lien which was foreclosed within one year, as provided by section 7259 Burns 1894, without making a mortgagee of the premises a party, is void as to such mortgagee at the expiration of one year from the time the notice of the intention to hold the lien was filed. *Stoermer v. Peoples Savings Bank, 104.*

**MINES AND MINING**—As to lease for coal mining purposes, see LANDLORD AND TENANT, 1, 2; *Island Coal Co. v. Combs, 379.*

**MORTGAGES**—See CHATTEL MORTGAGES.

Mortgage of partnership property by individual partner, see PARTNERSHIP; *Johnson v. Shirley, 453.*

As to mortgage by an insolvent foreign corporation to secure preferred creditors, see CORPORATIONS, 3; *Nathan, Ex., v. Lee, Rec., 232.*

Right of wife to redeem from sale of real estate under purchase-money mortgage executed by husband alone, see HUSBAND AND WIFE, 5; *Frain v. Burgett, 55.*

The lien of a mortgage foreclosed more than a year after the filing of a mechanic's lien is senior to that of the mechanic's lien where the holder of the mortgage was not made a party to the suit to foreclose the mechanic's lien. See MECHANIC'S LIEN, 1; *Union Nat. Savings, etc., Assn. v. Helberg, 139.*

The consideration sustaining a note is sufficient to sustain a contemporaneous mortgage securing the same. See BILLS AND NOTES; *Lackey v. Boruff, 371.*

1. *Deeds.—Governed by Law of Situs of Realty.*—Mortgages or conveyances of real estate are governed by the law of the *situs* of the realty, and all questions relating to the validity thereof are determined according to that law, and not according to the law of the domicile of the contracting parties. *Nathan, Ex., v. Lee, Rec., 232.*
2. *Record.—Validity.—Fraud.*—A mortgage executed by a corporation to secure a loan is valid as against existing creditors, although accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law. *American Trust, etc., Bank v. McGettigan, 582.*
3. *Action to Set Aside.—Receivers.*—A receiver cannot maintain an action on a complaint to set aside a mortgage existing on the trust property on the ground that the mortgage was not recorded, and that its execution was concealed, where the complaint shows upon its face that the relief sought is for the equal benefit of existing creditors and subsequent creditors without notice. *Ib.*

**MOTIONS**—To strike out part of pleading can only be made part of record by bill of exceptions or order of court. *Corbey v. Rogers*, 169.

**MUNICIPAL CORPORATIONS**—See **TOWNS**. The power of a city to pass an ordinance regulating the manner of running trains in city limits is conferred as a police power. See **MASTER AND SERVANT**, 12; *Pittsburgh, etc., R. Co. v. Moore, Adm.*, 345.

As to legalizing municipal bonds, see **CONSTITUTIONAL LAW**, 2, 3, 4, 5; *Schneck v. City of Jeffersonville*, 204.

1. *Changing of Boundary Lines*.—The creation, enlarging, and contraction of boundaries of municipal corporations are legislative, and not judicial functions, and may be exercised without the consent, and against the remonstrance of those interested. *Woolverton v. Town of Albany*, 77.
2. *Disannexing Territory*.—*Courts are Without Jurisdiction*.—Where the board of trustees of an incorporated town refuses to act upon a petition, under section 3248 Horner 1897, asking that certain territory be disannexed, an action will not lie to disannex such territory. *Ib.*
3. *Annexation of Territory*.—*Taxation*.—*Estoppel*.—Where a corporation, having notice of the attempted annexation of its property to a city, received benefits from the city in the way of fire and police protection for more than three years, and permitted its property to be sold for city taxes without calling in question the right of the city to levy the taxes, it will not be permitted to invoke the invalidity of the act of annexation for the purpose of escaping taxation. *DePauw Plate Glass Co. v. City of Alexandria*, 447.
4. *Improvements*.—*Liability of City*.—A city cannot render itself liable for work done, and materials furnished, "beyond the contract," in the construction of improvements which were to be paid for by assessments on the lots and lands to be benefited. *City of Huntington v. Force*, 368.
5. *Improvements*.—*Complaint by Contractor for Extras*.—*Sufficiency of*.—A complaint for extra work and materials by one who contracted with the city to make certain public improvements, which does not show that the extra work and materials were performed and furnished upon orders in writing signed by the engineer and approved by the common council, as required by the terms of the contract, is bad on demurrer. *Ib.*
6. *When City Becomes Liable on Contracts for Public Improvements*.—*Statute Construed*.—Under the act of March 8, 1889, known as the "Barrett Law," a city is not liable on contracts for the construction of certain public sewers until it has issued and sold improvement bonds, collected assessments, or otherwise realized from the property benefited the amounts to be paid out to the contractors. *Ib.*
7. *Municipality Serves as an Agency for the Legislature*.—A municipal corporation serves but as an agency or instrumentality in the hands of the legislature to carry out its will in regard to local governmental functions. *Schneck v. City of Jeffersonville*, 204.
8. *Aid for Public Improvements*.—*Location of County Seat*.—*Statute Construed*.—The location in a city of a county seat and the erection of the necessary county buildings are not "public improvements or public works" within the meaning of section 3152 R. S. 1881,

**MUNICIPAL CORPORATIONS—Continued.**

- authorizing cities to donate money or bonds in aid of public improvements or public works. *Ib.*
9. *Bonds for the Relocation of County Seat.—Statutes Afford Color of Legal Authority.*—Section 2 of the act of March 9, 1875, (Acts 1875, p. 84,) authorizing county authorities to accept donations towards the expenses of constructing public buildings in connection with the relocation of a county seat construed with section 8152 R. S. 1881, empowering cities to donate money or bonds in aid of public improvements or public works, did not, in the year 1876, authorize a city to incur a debt for the removal of a county seat and issue bonds therefor; but these sections of the statutes afford such color of legal authority for the issue of bonds for that purpose that it will be presumed that when such bonds were issued that the common council of the city acted in good faith. *Ib.*
10. *Costs Incident to Location of County Seat May be Imposed Upon City Where Located.*—A city receives such special benefits from the location of a county seat within its corporate limits as would justify the legislature, in its discretion, in authorizing the entire burden of the expenses incident to such location to be laid upon the property of such city. *Ib.*
11. *Riding on Sidewalk.—Ordinance Which May be Enforced.*—As the statutes now stand in this State a municipal corporation may by ordinance impose a penalty for riding a bicycle on sidewalks other than those constructed of brick, stone, plank or gravel. *Town of Whiting v. Doob, 157.*
12. *Statutes Prohibiting Riding on Sidewalk.—Construction.*—The act of March 10, 1885 (section 8333 Horner 1897), empowering boards of town trustees to prohibit the incumbering of sidewalks, and riding or driving thereon, does not repeal by implication section 1640 Horner 1897, which forbids cities and towns to impose penalties by ordinance for offenses punishable under a statute of the State. *Ib.*

**NEGLIGENCE—See CARRIERS; CONTRIBUTORY NEGLIGENCE; DAMAGES; MASTER AND SERVANT; RAILROADS.**

When negligence of servant may be imputed to the master, see **MASTER AND SERVANT, 16; Pittsburgh, etc., R. Co. v. Moore, Adm., 345.**

In action for personal injuries sustained while at work in stone quarry, see *Peerless Stone Co. v. Wray, 27.*

Of railroad company while operating trains on track of another company, see **RAILROADS, 7; Cleveland, etc., R. Co. v. Berry, 607.**

Violation of ordinance regulating speed of trains, see **MASTER AND SERVANT, 7; Pittsburgh, etc., R. Co. v. Moore, Adm., 345.**

1. *Carriers.—Loss of Goods by Fire.*—Placing a car loaded with cotton on a side-track cannot be held to be the proximate cause of the loss of the cotton by fire, where there was no proof that it took fire at that place.

*Insurance Co. v. Lake Erie, etc., R. Co., 334.*

2. *Proximate Cause.—Street Railroads.*—A street railway company will not be held liable for an injury to plaintiff caused by a collision with a car because of the fact that the car was running at a rate of speed in violation of a city ordinance, where no causal connection is shown between the speed of the car and the injury.

*Thompson v. Citizens Street R. Co., 461.*

**NEGLIGENCE—Continued.**

3. *Pleading.—Evidence.*—When a complaint against a street railway company for personal injuries contains only a general charge of negligence in the manner of running cars, plaintiff cannot prove that his injuries resulted from the failure of defendant to furnish a safe place to work, and safe appliances, or that the injury was wilful. *Ib.*
4. *Railroads.—Construction of Switch Device.—Proof as to similar Devices.*—A railroad company cannot establish freedom from negligence by showing the construction of its switch device to be similar to like devices upon another first class railroad, without further showing, if the construction may be dangerous to employees at work about it, that it had given notice of the danger, or given the servant such an opportunity to observe it as would have put a reasonably prudent person on his guard.  
*Indiana, etc., R. Co. v. Bundy, 590.*
5. *Street Railroads.—Presumptions.*—It will not be assumed, in the absence of evidence, that the body of a street car passing around a curve at the rate of eight or ten miles an hour will rock upon its trucks to such an extent as to strike a person occupying a position far enough away from the tracks to escape collision with a car passing at a lower rate of speed.  
*Thompson v. Citizens Street R. Co., 461.*
6. *Railroads.—Carriers.*—A railroad company is not required to place its cars temporarily standing on side-tracks within fire and police protection. *Insurance Co. v. Lake Erie, etc., R. Co., 334.*
7. *Assumption of Risk.—When Question of Fact.*—Plaintiff while coupling cars caught his foot in an exposed wire used in an interlocking switch device and was injured. The evidence showed that plaintiff as brakeman had passed the switch at the place of the accident a number of times, but had not observed that the wires were unboxed; that at the time of the injury it was dark, and plaintiff had a lantern in his hand with which he was signaling the engineer in the movement of the train, and, being occupied in observing the movement of the train, he stepped in to make the coupling without noticing the wire along side the track; that the usual mode of constructing interlocking switch devices, is to leave the wires uncovered from the derail to the distant signals but that in switch yards where a large amount of car handling is required the generally approved method is to box the wires at such places. *Held*, that the questions as to defendant's negligence and assumption of risk by plaintiff were properly submitted to the jury.  
*Indiana, etc., R. Co. v. Bundy, 590.*

**NEW TRIAL.**—Causes for new trial must be presented in motion for new trial, and the ruling on the motion assigned as error on appeal. See **APPEAL AND ERROR**, 37; *Zimmerman v. Gawmer, 552*. It is error to grant a new trial as of right before final judgment is entered. *Boyd v. Schott, 161.*

Where a new trial as of right is granted, a party does not waive his exception by following the case through a subsequent trial. See **APPEAL AND ERROR**, 34; *Boyd v. Schott, 161.*

On account of misconduct of bailiff, see **APPEAL AND ERROR**, 36; *Messenger v. State, 227.*

When motion for does not operate as a stay of execution, see **JUDGMENTS**, 4; *Logan v. Sult, 434.*

**NEW TRIAL—Continued.**

The remedy for failure of the jury to find all the facts is by motion for new trial. See *VENIRE DE NOVO*; *Zimmerman v. Gaumer*, 552.

1. *Instructions.—Assignment of Error.*—An assignment in a motion for a new trial for "error of the court in refusing to give to the jury each of the instructions, severally asked, numbered, 1, 2, 3," and for "error of the court in giving to the jury each of the instructions given by the court numbered 1, 2, 3," is sufficient to challenge each instruction of each set of instructions.

*Pennsylvania Co. v. Ebaugh*, 531.

2. *Misconduct of Bailiff.—Jury.—Waiver.—Criminal Law.*—Where the accused fails to interpose objections in regard to the alleged misconduct of a bailiff in charge of the jury while in consideration of their verdict in the trial of a criminal cause before the return of the verdict against him, without showing a sufficient excuse for such failure, it will be presumed that he acquiesced therein, and he will not be heard after the return of the verdict to make complaint for the first time relative to such misconduct.

*Messenger v. State*, 227.

2. *Joint Motion.*—Available error cannot be predicated upon the action of the court in overruling a motion for a new trial which is not well taken as to all of the defendants, where the motion is joint and general as to all of the defendants. *Prescott v. Haughey*, 517.

4. *Joint Motion.—Appeal and Error.*—Where a motion for a new trial made jointly as to all of the defendants is not well taken as to all, the failure of the court, in the exercise of its discretion, to sustain the motion as against part of defendants and overrule it as to others is not reviewable on appeal. *Ib.*

**NOTICE—**

*When Presumed to Have Been Given.*—The rule that where a public record is silent the law will presume that notice was given, relates only to courts of general jurisdiction. *Williams v. Atkinson*, 98.

**NUNC PRO TUNC ENTRY—**

When parol evidence is admissible in support of a motion for *nunc pro tunc* entry, see *PRACTICE*, 8; *Boyd v. Schott*, 161.

An oral announcement in open court to the counsel of both parties that the court rendered, and would cause to be entered, a judgment for the plaintiff, is not sufficient basis for the entry of a judgment *nunc pro tunc*. *Ib.*

**OFFICERS—**

1. *County Treasurer.—Term of Office.*—The term of office of a county treasurer elected at the general election of 1896, whose term had not commenced when the act of 1897 (Acts 1897, p. 288) took effect, commences on the 1st day of January next following the expiration of the term of the treasurer in office when the act took effect. *Aikman v. State, ex rel.*, 567.

2. *County Treasurer.—Term of Office.*—Where a county treasurer whose term of office expired August 5, 1897, had served the constitutional limit of four years, the office became vacant until the 1st day of January, 1898, by reason of the act of 1897 (Acts 1897, p. 288) fixing the time of commencement of the term of office of county treasurers, which vacancy the board of county commissioners had the right to fill by appointment. *Ib.*

**OFFICERS—Continued.**

8. *Appointment to Fill Vacancy.—Term.—Construction of Act of March 8, 1897.*—A county treasurer elected at the general election in 1896 qualified and took the office on the 9th of January, 1897, and continued to act until October 11, 1897, when he was removed and another was appointed to fill the vacancy. At the general election in 1898 a third person was elected, who qualified before January 1, 1899. *Held*, that, under the act of March 8, 1897 (Acts 1897, p. 288), construed with section 2, article 6 of the constitution, and section 5563 Horner 1897, the person elected at the general election in 1898 was entitled to the office on January 1, 1899.

*Weaver v. State, ex rel., 479.*

**OVERRULED CASES**—The following cases are overruled in part:

*Pittsburgh, etc., R. Co. v. Montgomery, ante, 1. See Pittsburgh, etc., R. Co. v. Moore, Adm., 345, and Pittsburgh, etc., R. Co. v. Hosea, 412.*

*Rose v. Rose, 93 Ind. 179. See Basye v. Basye, 172.*

*Boling v. Howell, 89 Ind. 329, Petry v. Ambroscher, 100 Ind. 510, Tarkington v. Purvis, 128 Ind. 182, Orb v. Coapstick, 136 Ind. 313, and Shirk v. Thomas, 121 Ind. 147. See Pugh v. Highley, 252.*

**PARTIES**—A joint assignment of error on appeal must be good as to all of the parties complaining. *See APPEAL AND ERROR, 8; Hatfield v. Cummings, Rec., 280.*

When cross-complainants are not necessary parties to an appeal, *see APPEAL AND ERROR, 33; Zimmerman v. Gaumer, 552.*

*Trusts.*—Where the trustee has resigned, and no successor has been appointed, the *cestui que trust* may bring suit to enjoin the illegal sale of the trust estate. *Zimmerman v. Makepeace, 199.*

**PARTNERSHIP**—When partner is estopped from appealing from order of court appointing receiver for firm, *see Williams v. Richards, 528.*

*Mortgage by Individual Partner.—Extent of Lien.—Rights of Firm Creditors.*—A mortgage executed by one partner on his undivided one-half of the partnership property for the purpose of securing his individual antecedent debt, by and with the consent of his co-partner, does not attach to the *corpus* of the partnership property, but only to the mortgaging partner's interest in the surplus remaining after the payment of the firm debts. *Johnson v. Shirley, 453.*

**PERSONAL INJURIES**—*See DAMAGES.*

Sufficiency of complaint in action for, *see COMPLAINT; Illinois, etc., R. Co. v. Cheek, 663.*

Injury caused by negligence of fellow servant, *see RAILROADS, 1; Pittsburgh, etc., R. Co. v. Montgomery, 1.*

Of person engaged in turning switches at intersection of street car lines, *see MASTER AND SERVANT, 6; Thompson v. Citizens Street R. Co., 461.*

1. *When Death of Injured Person Abates the Action.*—In the absence of statutory enactments, actions for injuries to the person abate on the death of the person injured, and do not survive to the personal representatives. *Hilliker v. Citizens Street R. Co., 56.*



**PERSONAL INJURIES—Continued.**

2. *Damages for Pain and Suffering.—Action Abates with Death of Injured Person.*—Under section 282 Horner 1897, providing that a cause of action arising out of an injury to the person dies with the person, except where a right of action is given for injury causing death, an action cannot be maintained by an administrator for damages for the physical pain and suffering of his intestate, since such right of action abates on the death of the intestate. *Ib.*

**PHYSICIANS**—Refusal of certificate to practice medicine on the ground that applicant had been and was guilty of gross immorality. See JUDGMENTS, 6; *In re Application of Coffin*, 439.

**PIPE LINE**—As to construction of on land of another without license, see INJUNCTION, 2, 3; *Windfall Nat. Gas, etc., Co. v. Terwilliger*, 364.

**PLEADING**—See COMPLAINT; PRACTICE; SET-OFF.

Matters creating an estoppel, must be specially pleaded. *Frain v. Burgett*, 55.

Defenses to a criminal charge which may be specially pleaded. See CRIMINAL LAW, 8, 4; *Davis v. State*, 145.

When cannot be aided by verdict, see APPEAL AND ERROR, 58; *Pittsburgh, etc., R. Co. v. Moore, Adm.*, 345.

1. *Specific Facts Control.*—The sufficiency of a pleading depends upon the specific facts alleged, and not upon the mere conclusions of the pleader. *Frain v. Burgett*, 55.

2. *When Pleading Not Sufficiently Specific.—Remedy.*—Where a complaint is not sufficiently specific the remedy is by motion. *Cleveland, etc., R. Co. v. Berry*, 607.

3. *Complaint.—Theory.*—Plaintiff must recover, if at all, on the theory of his complaint. *Boyd v. Bloom*, 152.

4. *Amended Complaint.—Demurrer.*—An amended complaint supersedes the original, and a demurrer to the "complaint" filed after the filing of an amended complaint refers to the amended complaint. *Town of Whiting v. Doob*, 157.

5. *Amendment.*—The action of the court in permitting plaintiff to amend his complaint after the jury was impaneled, and during the trial, will not be reviewed on appeal, where an abuse of discretion to the prejudice of defendant's substantial rights is not shown. *La Plante, v. State, ex rel.*, 80.

6. *Complaint.—Personal Injuries.—Knowledge of Danger.*—An allegation in a complaint in an action by an employe for personal injuries sustained by reason of defective appliances that he did not know of such defect or danger, not only repels actual knowledge, but any implied knowledge thereof. *Consolidated Stone Co. v. Summit*, 297.

7. *Complaint for Damages for Wrongful Appropriation of Real Estate.*—In an action against a railroad company for the wrongful appropriation of certain lands, a complaint alleging that plaintiff is the owner in fee, and was in peaceable possession under claim of title of described lands of a certain value, and that defendant wrongfully appropriated such lands to its own use, whereby damages were sustained by plaintiff, for which damages judgment is demanded, states a cause of action sufficient to withstand a demurrer. *Pittsburgh, etc., R. Co. v. Beck*, 421.

**PLEADING—Continued.**

8. *Complaint.—Account, Action on.*—A complaint alleging that the "plaintiff and defendants have had mutual dealings for two years, each keeping his own accounts, the items of which are numerous; \* \* \* that there is due plaintiff as a balance on said mutual accounts about \$200," demanding an accounting and judgment, is insufficient, where the nature of the dealings between the parties is not stated and no copy of the account is made part of the complaint. *Gise v. Cook*, 75.
9. *Negligence.—Complaint.—Demurrer.*—A general allegation that defendant, a railroad company, carelessly and negligently permitted a heavy iron pin to be placed and to remain on the tender of its locomotive is sufficient to repel a demurrer in the absence of a statement of specific facts showing otherwise. *Cleveland, etc., R. Co. v. Berry*, 607.
10. *Questioned First Time on Appeal.—Building and Loan Association.*—A defect in a complaint in an action to foreclose a mortgage in favor of a building and loan association on account of the failure to file a copy of the constitution and by-laws therewith is cured by a finding and judgment for plaintiff, and cannot be presented for the first time on appeal. *Kenner v. Whitelock, Rec.*, 635.
11. *Complaint.—Negligence.—Sufficiency of Averments as to Place of Injury.*—Averments in a pleading in an action against a railroad company for the death of an employe, caused by the negligence of defendant in operating trains within the corporate limits of a city, in a manner prohibited by ordinance, that defendant maintained yards and a telegraph office in such city; that deceased was employed as operator in said office; that it was his duty to receive and deliver orders to train crews passing said office, and in delivering an order he was struck by an engine and killed, sufficiently show that the place of the accident was within the corporate limits of such city. *Pittsburgh, etc., R. Co. v. Moore, Adm.*, 345.
12. *Facts in One Paragraph Not Made Part of Another by Reference.*—The facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. *Corbey v. Rogers*, 169.
13. *Answer.—Demurrer.*—Where a complaint fails to state a cause of action, it is never reversible error to overrule a demurrer to an answer thereto. *Hiatt v. Town of Darlington*, 570.
14. *Argumentative Denial.—Demurrer.*—A denial is not demurrable because argumentative. *Ib.*
15. *Demurrer.—Receiver.*—A demurrer to a complaint by a receiver to cancel a mortgage existing on the trust property calls in question not only the sufficiency of the facts alleged to constitute a cause of action, but also the right of the receiver to maintain the action. *American Trust, etc., Bank v. McGettigan*, 582.
16. *Demurrer.—Joint Demurrer.—Practice.*—A demurrer to two paragraphs of answer for the reason that "neither of said paragraphs of answer states facts sufficient to constitute a good defense to either of said cross-complaints," is joint, and not several, and if either paragraph of answer was good the demurrer was properly overruled. *Round v. State*, 39.
17. *Demurrer.—Motion to Make More Specific.*—The fact that a pleading is not as certain and specific as the rules of good pleading require will not, as a general rule, render it bad on demurrer; objection to a pleading on the ground that it is uncertain must be interposed by motion to make more specific. *Frain v. Burgett*, 65.

**PLEADING—Continued.**

18. *Demurrer.—Abatement.*—The question as to whether an action should abate because the complaint shows another action for the same cause pending between the parties is not raised by a demurrer for want of facts. *Basye v. Basye*, 172.
19. *Legal Capacity to Sue.—Demurrer.*—Absence of legal capacity to sue is prescribed by the code as one of the causes of demurrer to a complaint, and such question cannot be presented on appeal where the same was not assigned as cause for demurrer. *LaPlante v. State, ex rel.*, 80.
20. *Answer.—Estoppel.*—Defendants cannot avoid the payment of the debts of a corporation assumed by them in the purchase of property as part of the purchase money thereof on the ground that the deed to them was invalid and conveyed no title, where they were in possession of the property, without objection, claiming to own the same, had made valuable improvements thereon, and executed a mortgage upon same to plaintiff to secure such purchase money. *Allen v. Studebaker Bros. Mfg. Co.*, 406.
21. *Answer.—Verification.—Harmless Error.*—Plaintiff brought suit to foreclose a mortgage executed by defendants, and also certain mortgages executed by defendants' grantors upon the same property, the payment of which had been assumed by defendants as a part consideration of the sale of the property to them. Defendants filed an unverified answer, alleging the invalidity of the sale to them and the consequent want of consideration for their promise to pay their grantors' debts. *Held*, since such answer could have been stricken out on motion by reason of its failure to comply with section 367 Burns 1894, requiring such a pleading to be verified, that sustaining a demurrer thereto was harmless, if error, as the correct result was reached. *Ib.*
22. *Argumentative Denial.*—Defendant filed an answer to a complaint in an action to foreclose a chattel mortgage securing a purchase-money note, charging that he was induced to buy the property by the fraudulent representations of plaintiff, and as soon as he discovered the fraud he returned the property and demanded his note, which plaintiff refused to surrender. Plaintiff filed a reply alleging that defendant returned the property in a damaged condition, without notice to her of his intention to rescind the contract, and that she has never accepted a return of the property. *Held*, that the reply was merely an argumentative denial. *Magnuson v. Billings*, 177.
23. *Exhibit.—Mortgages.—Foreclosure.—Building and Loan Associations.*—A suit by a building and loan association to foreclose a mortgage and enforce a lien on the shares of stock assigned by the mortgagor in the note and mortgage as collateral security, is not an action on the certificate of stock within the meaning of section 365 Burns 1894, requiring a copy of the written instrument to be filed with the pleading, and such certificate filed with the complaint will be disregarded in determining the sufficiency of the complaint. *Indiana Mut. Building, etc., Assn. v. Plank*, 197.
24. *Exhibit.*—When the allegations of a pleading vary from the provisions of the instrument which is the foundation of the action, the provisions of the instrument control; but where the exhibit is not the foundation of the action it cannot be considered in determining the sufficiency of the pleading, but must be disregarded. *Ib.*
25. *Foreclosure of Mortgage.—Statute of Limitations.*—Where a complaint to foreclose a mortgage recites that a certain defendant

**PLEADING—Continued.**

claims some interest in the mortgaged property, but that if he has any interest it is subject to plaintiff's mortgage, such defendant cannot plead the statute of limitations, unless he alleges facts showing that he has an interest in the property. *Corbey v. Rogers*, 169.

**POLICE POWER**—To prohibit the playing of baseball on Sunday where a fee is charged is a valid exercise of the police power of the State. See **CRIMINAL LAW**, 29; *State v. Hogreiver*, 652.

**PRACTICE**—Where a complaint fails to state a cause of action, it is never reversible error to overrule a demurrer to an answer thereto. *Hiatt v. Town of Darlington*, 570.

Demurrer to the complaint filed after the filing of an amended complaint refers to the amended complaint. *Town of Whiting v. Doob*, 157.

When overruling motion to paragraph complaint is harmless error, see **TAXATION** 12; *La Plante v. State, ex rel.*, 80.

When refusal to submit certain interrogatories to jury is not error, see **INTERROGATORIES TO JURY**, 1, 2, 3; *Illinois, etc., R. Co. v. Cheek*, 663; *Udell v. Citizens Street R. Co.*, 507.

The separate motion of one jointly indicted with another for a change of venue involves and includes a motion for a separate trial. See **CRIMINAL LAW**, 14; *Jones v. State*, 318.

Foreclosure of Mechanic's lien without making a junior mortgagee a party, see **MECHANIC'S LIEN**, 1, 2; *Union Nat. Savings, etc., Co. v. Helberg*, 133; *Stoermer v. Peoples Savings Bank*, 104.

1. *Motion to Modify Special Finding.*—There is no rule of practice authorizing a motion to modify a special finding of facts.

*Windfall Nat. Gas, etc., Co. v. Terwilliger*, 364.

2. *Motion to Paragraph Complaint.*—When Properly Overruled.—A motion to separate complaint into paragraphs is properly overruled, where but a single cause of action is stated.

*Pittsburgh, etc., R. Co. v. Beck*, 421.

3. *Overruling Motion to Strike Out.*—When Harmless.—The refusal of the court to strike out a part of a complaint alleging that damage resulted from particular facts is harmless, where the special verdict returned by the jury shows that no damages were allowed on that account.

*Ib.*

4. *Motion for Judgment on Answers to Interrogatories.*—Where a motion for judgment on answers to interrogatories is general, the motion must be overruled if the answers are consistent with the general verdict under either paragraph of complaint.

*Cleveland, etc., R. Co. v. Berry*, 607.

5. *Harmless Error.*—*Special Verdict.*—*Appeal and Error.*—Where the special verdict followed the material facts as averred in the second paragraph of complaint, an erroneous ruling on a demurrer to the first paragraph will not constitute reversible error on appeal.

*Illinois, etc., R. Co. v. Cheek*, 663.

6. *Motion for Venire De Novo.*—When Made.—A motion for a *venire de novo* made after the rendition of the judgment cannot be considered.

*Bennett v. Simon*, 450.

**PRACTICE—Continued.**

7. *Complaint for Wrongful Appropriation of Land.—Motion to Strike Out.*—In an action against a railroad company it is not error to refuse to strike from the complaint an averment that in the use by the railroad company of the switch or side-track constructed by it on the land appropriated, "a great noise was kept up, and that such use occasioned confusion and detriment to the plaintiff."  
*Pittsburgh, etc., R. Co. v. Beck, 421.*
8. *Nunc Pro Tunc Entry.—Parol Evidence.*—It is only in connection with some written minute or memorandum of the court's action that parol evidence is admissible in support of a motion for a *nunc pro tunc* entry.  
*Boyd v. Schott, 161.*

**PRINCIPAL AND AGENT**—Recovery of money expended by husband in management of wife's estate, see **HUSBAND AND WIFE**, 2;  
*Gosnell v. Jones, Adm., 638.*

**PRINCIPAL AND SURETY**—Note executed by husband and wife for money loaned the wife and used by the husband, see **HUSBAND AND WIFE**, 3; *Lackey v. Boruff, 371.*

1. *Married Women.—Contracts of Suretyship.—How Avoided.*—Contracts of suretyship entered into by a married woman are voidable, not void, and can only be avoided by such married woman and her privies in blood, representation, or estate.  
*Ib.*
2. *Husband and Wife.—Bills and Notes.*—Where a husband and wife executed a note for money loaned the wife, and used by the husband, the husband is the principal, and the wife the surety.  
*Ib.*
3. *Bills and Notes.*—The relation of suretyship is fixed by the arrangement and equities between the debtors, and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements between the parties, ought to pay the debt.  
*Ib.*
4. *Bills and Notes.—Consideration.—Husband and Wife*—A note signed by a wife with her husband in renewal of a note for money loaned the wife and used by the husband, executed prior to the act of 1881 (sections 6960-6970, Burns 1894) enlarging the rights of married women, is not without consideration as to the wife, although the original note was void as to her, as the consideration moving to the husband was sufficient to support said note against all who executed the note with him.  
*Ib.*
5. *Husband and Wife.—Married Women.—Contracts of Suretyship.—Bills and Notes.*—A husband and wife executed a note prior to the passage of the act of 1881, enlarging the rights of married women for money loaned the wife and used by the husband. The note was renewed in 1881, and again in 1896, and secured by a mortgage on the wife's separate real estate. Plaintiffs, judgment creditors of the wife, brought suit to set aside the mortgage as fraudulent. *Held*, that the original note was void as to the wife, but valid as to the husband; that in the execution of the renewal note and mortgage the contract as to the wife was one of suretyship; that the note was not without consideration as to her, since the consideration moving to the husband was sufficient to support the note against the surety; that while the note and mortgage might be voidable as to such surety on the ground of coverture, it was valid as to plaintiffs.  
*Ib.*
6. *Mortgage Executed by Principal in Fraud of Creditors.*—A surety who accepts a mortgage, obtained by his co-surety, exe-

**PRINCIPAL AND SURETY—Continued.**

cuted by the principal to such sureties jointly, in fraud of creditors, takes the same charged with all of the infirmities affecting it by reason of the participation of the co-surety in the fraud, although such surety had no knowledge of the mortgage until after it was executed and recorded. *Round v. State, 39.*

**PRIVATE ROADS**—Right of grantor to maintain gates across road, see EASEMENTS, 1, 2; *Boyd v. Bloom, 152.*

**PUBLIC IMPROVEMENTS**—Necessary county buildings are not "public improvements or public works" within the meaning of section 3152 R. S. 1881. See MUNICIPAL CORPORATIONS, 8; *Schneck v. City of Jeffersonville, 204.*

**QUIETING TITLE—**

1. *Right to Sue.—Special Finding.*—A finding that F. had been the owner in fee of the lands in controversy, and had conveyed such lands to C., and that C. had died, leaving plaintiffs her only heirs at law, is sufficient to support an action to quiet title against one who claims title through F. *Island Coal Co. v. Combs, 379.*
2. *Right to Sue.—Lease.*—A suit to quiet title may be maintained against one who claims title under a lease from the grantor of plaintiff's ancestor. *Ib.*

**RAILROADS—See CARRIERS; PERSONAL INJURIES.**

When the negligence of employe in operating train may be imputed to the company, see MASTER AND SERVANT, 16; *Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*

Where an act fixing the liability of corporations is valid as to a railroad corporation, such corporation cannot be permitted to litigate the constitutionality of the act as to other corporations. See CONSTITUTIONAL LAW, 11; *Pittsburgh, etc., R. Co. v. Montgomery, 1.*

As to liability of railroad company for loss by fire of goods in car on side-track, see NEGLIGENCE, 1, 6; *Insurance Co. v. Lake Erie, etc., R. Co., 333.*

As to contributory negligence of passenger in entering car at place other than at station platform, see CONTRIBUTORY NEGLIGENCE, 2; *Illinois, etc., R. Co. v. Cheek, 663.*

As to assumption of risk by brakeman in coupling cars, see NEGLIGENCE, 7; *Indiana, etc., R. Co. v. Bundy, 590.*

Railroad corporations are persons within the meaning of section 21, article 1, of the Constitution. See CORPORATIONS, 6; *Pittsburgh, etc., R. Co. v. Montgomery, 1.*

Violation of ordinance regulating speed of trains, see MASTER AND SERVANT, 7; *Pittsburgh, etc., R. Co. v. Moore, Adm., 345.*

Intention of railroad company to appropriate strip of land between telegraph poles and right of way, see ADVERSE POSSESSION; *Pittsburgh, etc., R. Co. v. Beck, 421.*

Petition for highway across railroad right of way, see HIGHWAYS, 1; *Anderson v. Johnson, 249.*

1. *Personal Injuries Caused by Negligence of Fellow Servant.—Complaint.—Employers' Liability Act.*—Under sections 7083-7087, Burns

**RAILROADS—Continued.**

- 1894, known as the Employers' Liability Act, a complaint against a railroad company is sufficient to withstand a demurrer for want of facts where it states that the engineer, while in the service of defendant, in charge of a locomotive, negligently injured the plaintiff, both being at the time acting in the line of duty as employes of the defendant; and an averment that the engineer at the time he committed the injury was acting in the place and performing the duty of the corporation in that behalf is unnecessary. *Pittsburgh, etc., R. Co. v. Montgomery, 1.*
2. *Master and Servant.—Employers' Liability Act.—Contracts.—Release.—Voluntary Relief Association.—Election of Remedies.*—A contract voluntarily entered into by an employe with a relief department of the railroad company by which he was employed, agreeing that the acceptance of benefits from such relief department for injury or death should operate as a release of all claims for damages against the railroad company arising from such injury or death, is not a release within the meaning of section 7087 Burns 1894, declaring a contract void which exonerates a railroad company from a future liability to an employe for injuries sustained, as such contract is nothing more than a contract for a choice between two sources of compensation. The case of *Pittsburgh, etc., R. Co. v. Montgomery, ante, 1*, in so far as it conflicts with the foregoing doctrine is disapproved. *Pittsburgh, etc., R. Co. v. Moore, Adm., 345; Pittsburgh, etc., R. Co. v. Hosen, 412.*
  3. *Master and Servant.—Voluntary Relief Association.—Contracts.—Release.*—Where a railroad employe entered into a contract with the relief department of the company to the effect that the acceptance of benefits from such department for injury or death should operate as a release of all claims against the railroad company arising from such injury or death, the acceptance of benefits from the relief department by his widow, who was the sole beneficiary named in the contract, will not bar a recovery for the wrongful death of decedent for the use of his child. *Ib.*
  4. *Negligence.—Evidence.*—In an action against a railroad company for injuries to plaintiff, caused by an iron pin being thrown from the tender of a passing train by its speed, a verdict for plaintiff is not supported by evidence which does not disclose that the pin was on the tender in a position from which a reasonably prudent person would anticipate that it might be thrown off by the movement of the train, or that, if the pin were in a dangerous position, the defendant knew, or by the exercise of reasonable diligence might have known of it in time to have obviated the risk. *Cleveland, etc., R. Co. v. Berry, 607.*
  5. *Iron Pin Thrown from Tender of Passing Train.—Injury to Person Near Track.—Evidence.*—Evidence that an iron pin was thrown from the top of a locomotive tender running forty-two miles an hour, on a two-degree curve, on a smooth track, and struck plaintiff ten feet distant from the track and eight feet below the top of the tender does not support an allegation of the complaint that the pin was so thrown by the rapid motion of the train. *Ib.*
  6. *Injury to Employe Standing Near Passing Train.—Contributory Negligence.*—One in the employ of a railroad company, who is injured by an iron pin thrown from a passing train, is not shown to be guilty of contributory negligence by the finding of a special ver-

**RAILROADS—Continued.**

dict that such employe knew the character of the train, when it was due, its usual rate of speed in passing that point, and before it came along stepped aside at least ten feet from the track, and that the place to which he withdrew was safe from risks that might reasonably be apprehended. *Ib.*

7. *Operation of Trains on Track of Another Company.—Negligence.—Liability.*—A railroad company operating its trains on the track of another company is responsible for the negligence of its employes, whether in so operating its trains it is a trespasser, or is operating under a contract authorized by sections 1 and 3 of the act of March 10, 1873. *Ib.*

**RECEIVERS**—Action cannot be maintained by receiver to set aside mortgage on trust property on the ground that the execution of the mortgage was concealed. See MORTGAGES, 3; *American Trust, etc., Bank v. McGettigan*, 582.

When acceptance by partner of benefits accrued under decree of court in a receivership amounts to a waiver of the right of appeal from appointment of receiver, see *Williams v. Richards*, 528.

1. *Appointment.—Notice.*—The court has no jurisdiction to appoint a receiver in an action to set aside a conveyance as fraudulent and for the appointment of a receiver, without notice, and before summons is issued on such complaint. *Alexandria Gas Co. v. Irish*, 535.
2. *Appointment of.—Collateral Attack.*—The validity of the appointment of a receiver when made by a court of competent jurisdiction, is not subject to collateral attack. *Hatfield v. Cummings, Rec.*, 280.
3. *Appointment.—Collateral Attack.—Building and Loan Associations.*—A stockholder in a building and loan association cannot attack the proceedings and order of the court appointing a receiver of such association in a proceeding by the receiver to foreclose a mortgage against him. *Hatfield v. Cummings, Rec.*, 537.
4. *Appointment of Receiver.—Validity of.*—Averments of facts showing that defendants were stockholders in a corporation when plaintiff was appointed receiver thereof, and that the validity of such appointment had been finally adjudicated in an appeal to which the corporation was a party, constitute a sufficient reply to an answer denying the validity of the appointment. *Hatfield v. Cummings, Rec.*, 280.
5. *Authority to Bring Action.—Complaint.*—A complaint in an action by a receiver to foreclose a mortgage, alleging that plaintiff was duly appointed receiver of an association, and at the time was duly empowered, ordered and directed to collect by suit, if necessary, all claims due such association, sufficiently shows that the receiver had authority to sue. *Ib.*
6. *To Wind Up the Affairs of Corporations at Expiration of Charter.—Authority.*—Where, under section 8012 Horner 1897, a receiver is appointed to wind up the affairs of a corporation, such receiver, in an action to collect a debt due the corporation, may sue in his own name without specific authority from the court. *Ib.*
7. *Liens of Creditors.*—Where a court takes possession of the property of an insolvent corporation and appoints a receiver, it receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims and the standing of liens remain unaffected by the receivership.

*American Trust, etc., Bank v. McGettigan*, 582.



**RECEIVERS—Continued.**

8. *Foreclosure of Mortgage by Receiver.—Complaint.*—Where a receiver was appointed to take charge of the property of a corporation because its charter had expired, and such receiver was empowered to collect by suit all debts due the concern, a complaint by the receiver to foreclose a mortgage need not show that there are any debts due making the foreclosure necessary.

*Hatfield v. Cummings, Rec., 280.*

**REHEARING**—Will not be granted in order that either party may file additional briefs, or request an oral argument. See **APPEAL AND ERROR**, 56, 57; *Round v. State*, 39.

**REPLEVIN—**

*Pleading.—Complaint.—Demand.—Wills.*—A complaint in an action in replevin containing a general allegation of unlawful possession and wrongful detention which fails to allege a demand before action is bad as against a demurrer, where the specific averments show that defendant is in possession of the property under a claim of right by the provisions of a will in which he was made trustee of the property.

*Thieme, Tr., v. Zumpe, 359.*

**ROADS**—See **HIGHWAYS**; **EASEMENTS**.

**SET-OFF**—In an action for breach of contract of hire, wages earned by plaintiff after he was discharged cannot be pleaded as a set-off. See *Hamilton v. Love*, 641.

**SPECIAL FINDING**—See **JUDGMENTS**.

Sufficiency of to show title in plaintiff in action to quiet title to real estate, see **QUIETING TITLE**, 1; *Island Coal Co. v. Combs*, 379.

An exception made jointly to two or more conclusions of law must fail if either conclusion is correct. See **APPEAL AND ERROR**, 9; *Kline v. Board, etc.*, 321.

1. *When Treated as a General Finding.*—Where the record contains what purports to be a special finding with conclusions of law, which does not appear to have been made at the request of any of the parties to the action, it will be treated as a general finding.

*Nelson v. Cottingham*, 135.

2. *Conclusions of Law.—Exceptions.—Appeal and Error.*—The correctness of the conclusions of law upon the facts found can only be presented by exceptions to each conclusion of law and assigning as error such conclusions.

*Ib.*

3. *Finding Outside the Issue May be Disregarded.*—Defendant is not entitled to a new trial in an action to foreclose a mortgage because the court went outside the issues and directed the sale of additional lands not covered by the mortgage, but such erroneous finding should be disregarded, and judgment entered on the finding within the issues.

*Brunson v. Henry*, 310.

4. *Absence of Finding of Fact.*—Where the wife of defendant in an action to foreclose a mortgage assigns on appeal error of the court in overruling her motion for judgment in her favor on the ground that she did not sign the mortgage, and the special finding does not state that she was the wife of the defendant at the time of the execution of the mortgage, such fact must be taken as found against her.

*Ib.*

5. *Conclusions of Law.—Ultimate Fact.*—Where facts stated in a special finding admit of but one conclusion and lead to but one re-

**SPECIAL FINDING—Continued.**

sult, the deduction therefrom is a conclusion of law and not an ultimate fact. *DePauw Plate Glass Co. v. City of Alexandria*, 443.

6. *Mortgages.—Foreclosure.*—Where, by the terms of a mortgage the notes secured thereby were made payable to mortgagee's children and grandchildren, it was not necessary in an action to foreclose such mortgage, after the death of mortgagee, for the court to make any findings as to the debts of mortgagee.

*Brunson v. Henry*, 310.

7. *Mortgage.—Foreclosure.*—A copy of the mortgage set out in the special findings in an action to foreclose a mortgage is not only evidentiary, but an inferential fact, and is properly set out in the conclusions of law. *Ib.*

**SPECIAL VERDICT—See INTERROGATORIES TO JURY; VERDICT.**

The act of March 11, 1895, amending the practice act, and providing for special verdicts sufficiently expresses the subject in the title. See **STATUTES**, 2; *Udell v. Citizens Street R. Co.*, 507.

Objection to request for special verdict, see **APPEAL AND ERROR**, 45; *Ib.*

Is entitled to the same presumptions in its favor as a general verdict. See **APPEAL AND ERROR**, 28, 80; *Pittsburgh, etc., R. Co. v. Beck*, 421; *Hatfield v. Cummings, Rec.*, 537.

What are proper instructions when a special verdict is requested, see **INSTRUCTIONS**, 14; *Udell v. Citizens Street R. Co.*, 507.

Where facts found warrant the drawing of two inferences as to contributory negligence of plaintiff, and the jury found the ultimate fact in favor of plaintiff, such inference will be accepted by the court as conclusive. See **CONTRIBUTORY NEGLIGENCE**, 1; *Illinois, etc., R. Co. v. Cheek*, 663.

1. *Constitutional Law.—Right of Trial by Jury.*—The act of March 11, 1895, amending the practice act, and providing for special verdicts, is not unconstitutional, as violating the right of trial by jury. *Udell v. Citizens Street R. Co.*, 507.

2. *Only the Facts Found are to be Considered by the Court.*—The jury being required in their special verdict to find facts, mere conclusions, surmises, and evidence have no legitimate place therein, and are entitled to no consideration by the court.

*Wabash R. Co. v. Ray, Adm.*, 392.

3. *Failure to Find Material Fact.—Remedy.—New Trial.*—Where a special verdict fails to find material facts, within the issue, which were established by the evidence, the remedy is not by a motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved. *Pittsburgh, etc., R. Co. v. Montgomery*, 1.

4. *Omission of Formal Conclusion.*—Where the facts in a special verdict are properly stated the omission of the formal conclusion will not vitiate it. *Illinois, etc., R. Co. v. Cheek*, 663.

5. *Conclusions of Law.—Special Verdict.*—Incorporating in a special verdict interrogatories requiring the jury to state conclusions of law instead of facts is harmless. *Ib.*

6. *Railroads.—Rules.—Evidence.*—A special finding of the jury, that under the "rules" of the defendant railroad company certain duties were assigned to the engineer in charge of a train, may be

**SPECIAL VERDICT—Continued.**

supported by the evidence, though no particular "rule" was introduced in evidence. *Pittsburgh, etc., R. Co. v. Montgomery, 1.*

7. *Failure to Find Essential Fact in Favor of Party Having Burden of Proof.*—Where the party asking for judgment on a special verdict is not the one upon whom rests the burden of the issue, he is entitled to judgment in the absence of an essential fact which it was incumbent upon his adversary to establish.

*Wabash R. Co. v. Ray, Adm., 392.*

8. *Failure to Sustain Material Averments of Complaint.*—Plaintiff was employed to assist in blasting and removing stone and other debris from a sewer, and was injured by an explosion caused by striking his pick against an unexploded charge of dynamite. The negligence charged in the complaint was that defendant in blasting drilled numerous holes in the stone, loaded them with dynamite, and discharged them at the same time, instead of discharging one at a time, causing portions of the dynamite to remain in the holes unexploded, and rendering the place dangerous. The special verdict found that plaintiff knew that dynamite was used in such blasting, and on a number of occasions dug out unexploded loads of dynamite along the line of the sewer; that the work of removing stone from the sewer after blasts had been made was dangerous and hazardous, and such danger was apparent to a man of ordinary intelligence; that the method employed by defendant for discharging the dynamite was the best known for such purposes, and was recognized as a proper and safe method. *Held*, that the facts found by the special verdict did not entitle plaintiff to a judgment under his complaint.

*Bane v. Keefer, 544.*

**STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.**

**STATUTES**—Section 1 of the act of March 11, 1889, fixing the interest of a childless second wife in the lands of her husband is void.

See DESCENT AND DISTRIBUTION, 1; *Helt v. Helt, 142.*

1. *Construction of When Re-enacted.*—When the legislature re-enacts the statute of the state, it adopts also the construction given to such statute by the courts of the state before such re-enactment. *Hilliker v. Citizens Street R. Co., 86.*
2. *Title.—Constitutional Law.—Special Verdict Law.*—The act of March 11, 1895, amending the practice act, and providing for special verdicts, entitled "An act to amend section 389 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881," sufficiently expresses the subject in the title. *Udell v. Citizens St. R. Co., 507.*
3. *Amendment.—Act of 1885.—Intoxicating Liquors.—License.—Towns.*—The act of April 10, 1885 (Acts 1885, p. 171), for the incorporation of towns, authorizing the trustees thereof to license the sale of intoxicating liquors, is void, since it is an amendment of the act of March 1, 1877, held by the Supreme Court to be invalid.

*Copeland v. Town of Sheridan, 107.*

**STATUTORY CONSTRUCTION—Of re-enacted statute, see STATUTES, 1; *Hilliker v. Citizens Street R. Co., 86.***

For table of statutes cited and construed, see page xxviii.

*Constitutional Law.*—The rule that a penal statute will be strictly construed does not apply in determining the constitutionality thereof.

*State v. Hoyeriver, 652.*

**STREET RAILWAYS**—Liability of street railway for injury caused by running cars at a high rate of speed in violation of city ordinance, see NEGLIGENCE, 2; *Thompson v. Citizens Street R. Co.*, 461.

Injury of person engaged in turning switches at intersection of car lines, see MASTER AND SERVANT, 6; *Ib.*

1. *Injuries to Trespasser*.—Plaintiff, a boy eight and one-half years of age, being unable to get into an open electric street car on account of the crowded condition thereof, stood on the side of the car not intended for passengers, and on which strips were placed to prevent the ingress or egress of passengers, with his feet on the boxing of the axle, and held on to a portion of a seat with his hands. He rode in a stooped position three-fourths of a mile, when, being unable to retain his hold, he fell and was run over by the wheels of the car, and injured. None of the employes of the train saw the boy hanging on the car when it was in the act of starting nor while under way, but might have seen him, if they had made an examination of that part of the car. Plaintiff did not pay his fare, but intended to do so when called upon. *Held*, that plaintiff was not a passenger upon defendant's cars, to whom it owed the duty of safe carriage and immunity from injury.

*Udell v. Citizens Street R. Co.*, 507.

2. *Injuries to Trespassers*.—*Infants*.—*Special Verdict*.—Where the special verdict in an action against a street railway company for personal injuries shows that plaintiff was wrongfully upon the car at the time of the injury, the fact that he was only eight and one-half years of age did not make him any less a trespasser. *Ib.*

**SUNDAY**—Section 2087 Burns 1894, prohibiting the playing of baseball on Sunday, is constitutional. See CONSTITUTIONAL LAW, 12; *State v. Hogreiver*, 652.

**SUPREME COURT**.—Transfer of cause to Appellate Court, see APPELLATE COURT, 2; *Lewis v. Albertson*, 693.

*Jurisdiction*.—*Cause Will Not be Transferred from Appellate to Supreme Court at Instance of an Amicus Curiae*.—The question of the constitutionality of a statute is not "duly presented" within the meaning of section 1336 Burns 1894, so as to give jurisdiction to the Supreme Court and require a cause to be transferred from the Appellate Court, where the question of constitutionality is not raised except in a brief on appeal filed by an *amicus curiae*.

*Boyd v. Brazil Block Coal Co.*, 543.

**SURVEY**—See BOUNDARIES.

As to notice of survey by county surveyor, see BOUNDARIES, 6; *Williams v. Atkinson*, 98.

A surveyor not authorized to change a lawfully established corner or line because of an agreement of adjoining landowners. See BOUNDARIES, 5; *Ib.*

Landowner does not waive rights under previous survey by a demand for a new survey. See BOUNDARIES, 3, 4, *Ib.*; *Spacy v. Evans*, 431.

*Appeal*.—*Burden of Proof*.—The one who appeals from a survey of land, under section 5955 Horner 1897, has the burden of showing that the survey appealed from was incorrect. *Bennett v. Simon*, 490.

**TAXATION**—Of building and loan associations, see CONSTITUTIONAL LAW, 1; *State, ex rel., v. Workingmen's, etc., Assn.*, 278.

The State is not required to file for payment its claim for taxes against a decedent's estate. *Graham v. Russell, Aud.*, 186.

1. *Failure to List Property.—Action.—Relation.*—An action by the State for failure to list property for taxation is properly brought on the relation of the prosecuting attorney.

*La Plante v. State, ex rel.*, 80.

2. *Failure to List Property.—Complaint.*—In an action against a taxpayer to recover penalties for failure to list property for taxation, each year's failure constitutes a separate cause of action, and should be stated in a separate paragraph of the complaint. *Ib.*

3. *Failure to List Property.—Penalty.*—A penalty of \$1,500 for failure to list property for taxation is not excessive, where the evidence showed that defendant omitted from his tax list over \$20,000 worth of property held by him, subject to taxation, and converted about \$1,800 for the purpose of avoiding taxation. *Ib.*

4. *Failure to List Property.—Complaint.*—A complaint in an action by the State on the relation of the prosecuting attorney for the recovery of the penalty provided by statute for failure to list property for taxation which discloses that the omitted property consisted of money, bonds, mortgages, notes, etc., subject to taxation, is sufficient without averring the value of the particular property. *Ib.*

5. *Listing Omitted Property by County Assessor.*—The failure of the county assessor, on listing omitted property for taxation, to file in the county auditor's office a statement of his reasons for listing the property will not render the assessment invalid, where there is no other assessment against the owner of such omitted property.

*Hunter Stone Co. v. Woodard*, 474.

6. *Corporation.—Listing Omitted Property by County Assessor.*—Where a private corporation had, in good faith, made out and delivered to the proper township assessor a verified schedule of its property, as provided by section 73 of the general tax law of 1891 (Acts 1891, p. 241), the failure thereafter of the county board of review to make any assessment for taxes against the property, did not preclude the county assessor from listing for taxation the property of such corporation. *Ib.*

7. *County Assessor May Inspect Books of Building and Loan Associations and Other Corporations.—Mandamus.*—For the purpose of listing the property of building and loan associations and other corporations for taxation a county assessor has the right to inspect the books and papers thereof, and may enforce that right by mandate. *State, ex rel., v. Workingmen's, etc., Assn.*, 278.

8. *Building and Loan Associations.*—Stock in building and loan associations, whether paid up, prepaid, running or otherwise, is taxable at its true cash value. *Ib.*

9. *Petition of Auditor on Behalf of State to Set Aside Final Settlement Report of Decedent's Estate.—Sufficiency Of.*—Where a county auditor petitions the court to set aside the final settlement report in a decedent's estate in order that the property of the estate may be subject to the payment of delinquent taxes, the petition need not contain averments that the petitioner did not appear at the final settlement and that he was not personally summoned to attend.

*Graham v. Russell, Aud.*, 186.

10. *Setting Aside Final Settlement of Decedent's Estate to Collect Taxes.—Power of County Auditor.*—A county auditor, as the instrument or

**TAXATION—Continued.**

agency of the State under section 8560 Burns 1894, is authorized to petition the court and secure a final settlement of a decedent's estate to be set aside so that taxes evaded by decedent may be collected. *Ib.*

11. *Reopening of Decedent's Estate to Collect Taxes.*—Ignorance of the executrix that her testator had failed to list and return all his property for taxation will not defeat the setting aside of the final settlement report in order to subject the estate to the payment of taxes for which decedent was liable. *Ib.*

12. *Harmless Error.—Overruling Motion to Paragraph the Complaint.*—The action of the court in overruling a motion to require the State in an action to recover penalties for failure to list property for taxation, to state each year's failure in separate paragraphs is harmless, where the State elected to ask a recovery for one particular year only. *La Plante v. State, ex rel., 80.*

**TOWNS—See MUNICIPAL CORPORATIONS.**

Riding a bicycle on the sidewalk of a town is a public offense, see HIGHWAYS, 9; *Town of Whiting v. Doob, 157.*

1. *Annexation of Territory.—Order of County Commissioners.—Collateral Attack.*—The board of county commissioners has jurisdiction to determine the sufficiency of a petition of town trustees, under section 4426 Burns 1894, for the annexation of territory, and where its record shows that the petition came on to be heard, and it was found that due notice had been given, such record is conclusive, and is not subject to collateral attack because of any irregularity in the election or qualification of the town trustees who petitioned for the annexation, or because of any failure to serve with notice some landowners within such territory.

*Hiatt v. Town of Darlington, 570.*

2. *Annexation of Territory.—Validity of Proceedings.*—The proceedings to annex territory to a town are not rendered invalid by the facts that the certificate of election of the town trustees presenting the petition was not filed until the validity of their acts had been called in question in another suit, which had been dismissed, that taxes paid by owners of the annexed land exceeded the improvements made thereon, and that the owners held in fee the cemetery lots in such land. *Ib.*

3. *Annexation of Territory.—When Owners of Lands Estopped from Questioning Validity of Annexation Proceedings.*—Where an owner of territory annexed to a town stands by and permits the municipality to expend large sums of money in building streets, alleys, and sidewalks, enhancing the value of his property, he will be estopped from disputing the validity of annexation proceedings of which he had notice. *Ib.*

4. *Annexation of Territory.—Notice to Landowners.—Collateral Attack.*—Persons who were not served with notice of a proceeding for the annexation of territory to a town, as provided by section 4426 Burns 1894, but who unite in a joint attack thereon with others who were so served, cannot in that proceeding maintain the attack upon any grounds which are not available to their co-plaintiffs. *Ib.*

**TRESPASS—**

*License to Cut Standing Trees.—Death of Licensor.—Revocation.*—Standing trees may be the subject of sale by parol, so as to give the purchaser a license to go upon the land to cut and remove them, but

the death of licensor before the license is executed effects a revocation of such license. *Spacy v. Evans*, 431.

**TRIAL**—See INSTRUCTIONS; SPECIAL FINDING; SPECIAL VERDICT.

The filing by defendant of a motion for change of venue and the proceedings of the court on such motion are not a part of the trial within the meaning of section 1855 Burns 1894. See CRIMINAL LAW, 9; *Jones v. State*, 318.

**TRUSTS**—When trust estate not subject to sale on execution for debts of *cestui que trust*, see EXECUTION, 2; *Zimmerman v. Makepeace*, 199.

Where the trustee has resigned, and no successor has been appointed, the *cestui que trust* may bring suit to enjoin the illegal sale of the trust estate. *Ib.*

**VENIRE DE NOVO**—Error in overruling a motion for a *venire de novo* is not available on appeal where no exception was reserved to the ruling. *Zimmerman v. Gaumer*, 552.

*Failure to Find All the Facts*.—*New Trial*.—The remedy for failure of the jury to find all the facts is by motion for new trial, and not by motion for *venire de novo*. *Ib.*

**VENUE**—The separate motion of one jointly indicted with another, for a change of venue, involves and includes a motion for a separate trial. See CRIMINAL LAW, 14; *Jones v. State*, 318.

*Change Of*.—*Discretion of Court*.—*Appeal and Error*.—Under the statute, section 1840 Burns 1894, it is discretionary with the court to grant or deny a motion for change of venue, and an order of court refusing a change of venue will not be disturbed on appeal where there is no abuse of discretion shown. *Ib.*

**VERDICT**—See SPECIAL VERDICT.

The action of the court in directing a verdict will not be reviewed on appeal where the evidence is not in the record. See APPEAL AND ERROR, 24; *Bane v. Keefer*, 544.

Error of court in directing verdict must be presented by motion for new trial. See APPEAL AND ERROR, 47; *Ib.*

1. *Answers to Interrogatories*.—The general verdict determines all issues in favor of the party recovering same, and the verdict will stand as against a motion for judgment on answers to interrogatories unless the answers are in irreconcilable conflict therewith.

*Consolidated Stone Co. v. Summit*, 297.

2. *Answers to Interrogatories*.—*Presumptions*.—The Supreme Court will indulge all reasonable presumptions in favor of a general verdict as against a motion for judgment on answers to interrogatories. *Ib.*

**WAIVER**—Failure to discuss an error assigned amounts to a waiver thereof. See APPEAL AND ERROR, 38; *Lewis v. Albertson*, 693.

An alleged error in refusing to dissolve a restraining order is waived by putting the cause at issue and proceeding to trial on the merits. *Zimmerman v. Makepeace*, 199.

**WILLS**—As to instruction that a person who has lost his memory is incapable of making a will, see INSTRUCTIONS, 15; *Whiteman v. Whiteman*, 263.

**WILLS—Continued.**

1. *Latent Ambiguity.—Extrinsic Evidence.*—Where the writer of a will wrote a preamble, "Whereas, I, \_\_\_\_\_, on the 18th day of October, 1890, made my last will and testament of that date, do hereby declare the following to be a codicil to the same," evidence was properly admitted to show that the writer wrote "18th day of October" instead of \_\_\_\_\_ day of February; that the will written on the \_\_\_\_\_ day of February was fully, and in all of its material parts, copied into and incorporated in the instrument written October 18th, and that the will referred to in the preamble thereof was destroyed at the request of the testator, and in his presence. *Ib.*
2. *Latent Ambiguity.—Extrinsic Evidence.—Codicil.*—Parol evidence is admissible in a suit to contest the validity of a will to show that the preamble thereof purporting to be a codicil to a will of the same date was intended to refer to a will of a previous date which, after writing such preamble, was copied therein, and then destroyed at the request of testator, and in his presence. *Ib.*
3. *Construction.—Life Estate.—Right of Possession.—Trustee.*—A testatrix in one item of her will bequeathed certain property to her daughter "subject to the provisions contained in item ten of this will." Item ten provided that a person named as trustee for her should take charge of all the property given her by the will, except certain real estate devised in another item of the will, and that he pay her annually the net income therefrom, and that upon her death he turn over said property to her children. *Held*, that the daughter takes only a life interest in the property, and that the right of possession is in the trustee. *Thieme, Tr., v. Zumpe, 359.*
4. *Construction.—Use of Income of Estate for Life.—Residuum.*—Testator bequeathed to his wife the use of all his property both real and personal for and during her lifetime, with a provision that "she shall use but the rents and profits of said estate, or so much thereof as she can make profitable use of." In a further provision of the will the testator enjoined upon his executors the duty "to assist her and attend to all her business if she so desired." *Held*, that the will gave the widow only a right or power to use the income, and, upon her failure to avail herself of that right, the rents and profits remaining with the executors at her death went to testator's residuary legatees. *Brunson, Adm., v. Martin, 111.*
5. *Construction.—Legacy.—Vesting of Estate.*—A bequest of \$4,000 to testator's daughter, and providing that "If she shall die leaving no child surviving her, then said \$4,000 shall be equally divided among my other heirs," refers to the death of such legatee during the lifetime of the testator. *Morgan v. Robbins, 362.*
6. *Construction.—Disinheritance.*—A construction of a will which would disinherit a child or direct descendant in favor of collateral kindred, is not to be accepted unless the language of the will is such as clearly to indicate such intention. *Aspy v. Lewis, 423.*
7. *Construction.—Vesting of Estate.*—The law looks with disfavor upon the postponement of estates, and the intent to postpone must be clear and manifest, and must not arise by mere inference or construction. *Ib.*
8. *Construction.—Devise.*—Where by the terms of a will it is clear that the testator intended to devise all of a tract of land to certain persons, and the tract is found to contain more acres than the will calls for as shown by the sum of the acres devised to the different persons, the excess will be apportioned among the de-



**WILLS—Continued.**

visees in proportion to the number of acres named for each in the will. *Bennett v. Simon*, 490.

9. *Construction.—Words of Survivorship.*—The words of survivorship in a will must be held to relate to the death of the testator rather than to the death of the first taker, if the words of the will are capable of such construction. *Aspy v. Lewis*, 493.

10. *Construction.—Survivorship.—Vested Remainder.*—Testator devised his real estate to his wife so long as she remained his widow, and provided that "the above estate that is bequeathed to my wife shall be in full possession of my only daughter, Maria Louisa, at the death or marriage of my wife, provided she shall be living, and if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers and sisters." *Held*, that the will gave a vested remainder to the daughter at her father's death, which, at the daughter's death before her mother, descended to her children. *Ib.*

11. *Evidence.—Executor as Witness.*—The executor of a will is a competent witness in support of the will as to matters accruing during the lifetime of the testator. *Whiteman v. Whiteman*, 263.

**WITNESSES**—Executor of a will as a witness in reference to matters accruing during the lifetime of testator, see **WILLS**, 11; *Whiteman v. Whiteman*, 263.

Cross-examination of defendant in a criminal action as to other criminal offenses, see **CRIMINAL LAW**, 5, 8; *Ellis v. State*, 326.

**WORDS AND PHRASES—**

*Appeal and Error.*—The word "protest" is not equivalent to the word "except" as used in reserving an exception to a ruling of the court, and "earnestly protesting" against a ruling presents no question on such ruling for review. *Robinson v. State*, 304.



